The Central Law Journal.

ST. LOUIS, OCTOBER 10, 1884.

CURRENT TOPICS.

Judge Dillon is a man of such unquestioned ability that any remarks which may drop from his lips are worthy of careful consideration. In his address before the American Bar Association, he thus referred to the jury system:

"I have given to this subject some observation and reflection, the results whereof I have elsewhere expressed. I will not here repeat them further than to re-affirm that in my judgment the jury is both a valuable and an essential part of our judicial and political system. It is not simply to be venerated as a reminiscence, but prized for its usefulness. Its roots strike deep into the soil and cling to the very foundation stones of our jurisprudence. The system belongs to free institutions and tends to fortify and perpetuate them. I quite agree with Chief Justice Taney, than whom few judges have had wider experience and none, perhaps, have been more capable of forming a sound and unimpassioned judgment. He has left on record his deliberate opinion that our liberties are closely bound up with the preservation of the jury. Tyler's Life of Taney. I protest against the continentalization of our law. I invoke the conservative judgment of the profession against the iconoclast who in the name of reform comes to destroy the jury; against the rash surgery which holds not a cautery to to cure, but a knife to amputate and excise."

In an article upon the subject of "Compositions With Creditors" (17 Cent. L. J. 302) was shown the various exceptions to the general rule which declares that a creditor is not bound by the acceptance of a portion of his debt in satisfaction of the whole. The Supreme Court of Pennsylvania in its recent decision in Hendricks v. Thomas (15 W. N. C. 72) has established another exception, viz.: "Payment, by way of compromise, of part of a judgment, upon which execution can be issued against certain property only, constitutes a valid accord and satisfaction." It seems that A held a judgment against B, upon a judgment bond. By the terms of the bond no judgment founded thereon could be collected from other than certain specified property. A, having issued execution on the judgment against other property of B, the parties pending a rule to restrict the collection of the judgment and stay execution, agreed upon a compromise. A. accepted part of the judgment in cash in full of his claim, giving a full discharge and acquittance to B and it is held that the compromise was founded upon a valuable consideration, and was binding on the parties. This is clearly good law. A. was entitled to satisfaction out of particular property. The collection of the debt depended upon the contingency of his possessing property of that description. By receiving a portion out of B's general fund, he was permitted to reap the benefit of something to which he had no title. This was clearly a consideration and "the law pays no regard to its adequacy." The original rule while founded on reason, has lost its usefulness, and the sooner it is generally abrogated by legislation universally, so much sooner will the courts be relieved of the duty of useless hair-splitting in order to fashion their doctrines to suit the business demands of the day.

Time only will tell to what uses the writ of of injunction will be applied. Courts, some one has said, adjust themselves according to new developments, and if no less an authority than the English Court of Appeal sanctioned the proceeding which induced these remarks, we should feel strongly tempted to let our risibilities overcome us. Loog v. Bean, L. R. 26 Ch. Div. 306, is we believe the first instance of an injunction being granted to restrain one from making slanderous statements. The defendant had been an agent of the complainants and had been dismissed and was circulating slanderous statements of the plaintiffs among their customers and others. Cotton, L. J., says:

"Here is a man who had been in the employ of the plaintiffs, making to their customers slanderous statements with regard to the business of the company, and trying to induce the customers not to pay the sums which they owe to the plaintiffs. The court has of late granted injunctions in cases of libel, and why should they not also do so in cases of slander? It is clear that slanderous statements, such as were made to old customers in this case, must have a tendency materially to injure the plaintiffs' business; they are slanders, therefore, spoken against their trade. It is not necessary, therefore, in my opinion, to show that loss has actually been incurred in consequence of them. If they are calculated to do injury to the trade, the plaintiffs may clearly come to the court. There is, no doubt, more difficulty in granting an injunction as regards spoken words than as regards written statements, because it is difficult to ascertain exactly what

is said. But when the defendant is proved to have made certain definite statements, such as are mentioned in the order, in my opinion an injunction is properly granted to prevent his repeating them. The defendant, though no doubt the tongue is an unruly member to govern, must take care that he keeps his tongue in order, and does not allow it to repeat those statements which he is by the injunction restricted from uttering."

Bowen, J., said:

"Now, has the court jurisdiction to grant such an injunction? It seems to me to be clear that it has. There is a wrong done which is actionable if it has been committed, and which naturally would, if repeated or persisted in, affect injuriously the property or trade of the plaintiff company. It has been held since the Judicature Act, that a plaintiff is entitled to the protection of the court against a wrong of that sort which is contained in a written document; that is to say, the court will restrain the publication of a libel which is immediately calculated to injure the property and trade of the person against whom it is directed. Then can there be any distinction in principle between a slander which is contained in a written document and a slander which is not? In the case of Thorley's Cattle Food Company v. Massam, L. R. 14 Ch. D. 763, and Thomas v. Williams, Ib. 864, the court interfered to restrain the slander which was placed upon paper; so that clearly in the case of such written slander as is naturally attended with injury to property and business, the court has jurisdiction to interfere, and it appears to me that the same principle must apply to spoken slander."

It will be remembered that not long ago, a decision was rendered by the Supreme Court of Minnesota to the effect that the attachment of a seal to an instrument, in all other respects having the elements requisite to negotiability, destroyed its negotiable character. Though this opinion was consistent with the old theories underlying the doctrine of negotiability, yet, as everyone must have observed, it clashed with the modern view, which has received recognition by no less an authority than the Federal Supreme Court, that bonds have the same commercial character that their unsealed brethren possess. This question came before the Supreme Court of Pennsylvania, in Kerr v. The City of Corry not long ago. The lower court relying upon Diamond v. Lawrence County, 1 Wright 353, adhered to the old view, and permitted the city to show that the bonds in suit were fraudulently issued, though Kerr was a *bona fide* purchaser thereof before maturity. The Supreme Court rejects the fossilized doctrine and places itself on the level of progress of the United States Supreme Court. It declines to be put in that position by which it would be made "to antagonize the sentiment of the commercial world, and the doctrine of every other court, whether in this country or England." The court had not, of course, heard of the Minnesota decision. In concluding its opinion, the court summarizes the law upon bonds with reference to their negotiability thus:

They have at least a *quasi* negotiability in these particulars; they pass by delivery, and the holder may sue in his own name; the transferree for value holds title as an original obligee; he cannot be affected by equities existing between the previous holders and the municipality of which he had no notice; neither can he be affected by the default of the officers issuing them, unless such default directly affects their power to make and put them upon the market.

LIQUIDATED DAMAGES.

I.

(1.) Preliminary.
(2.) Penalties in General.
(3.) Principles Governing Construction.
  (a) When described as Liquidated Damages.
    (1.) Performance of Single Act.
      (a) Reasons for the Rule.
      (b) Exception.
    (2.) Performance of Many Acts.
      (a) In General.
      (b) Several Acts not of Same Degree.
        (1.) Reasons for the Rule.
        (2.) Illustration, Kemble v. Farren.
    (3.) When Sum is not Designated.
      (a). In General.
      (b.) Test for Determining Whether Penalty or Liquidated Damages.
  (4). When penal words employed.
    (a). Penalty generally.
    (b). Held liquidated damages when.
  (5). Bonds.
  (6). Application of Rules.
    (a). To Restraints of Trade.
    (b). To other Miscellaneous contracts.
    (c). To contracts of sale of goods.
  (7). Distinction between Specialties and Parol Contracts.
    (a). Preliminary.
    (b). No ground for distinction.
  (8). Stipulated damages "over and above" actual damages.
  (9). Recovery releases covenantor.
  (10). Acceptance of part performance. Effect of.
  (11). Effect of partial waiver.

(1). *Preliminary.* The subject of "liquidated damages and penalties" was considered sometime since in the columns of the JOURNAL by a learned writer,[1] but an attempt will be here made to reduce the law from a confused array of individual cases to

[1] Isaac N. Payne, Esq., of Detroit, Mich. 18 Cent. L. J.

a systematic collection of rules. One in investigating the subject might in anger come to the conclusion that the only certainty about it was, as one judge humorously said, the "conflict of opinion" which prevails. The fact is, however, that while there is some conflict, there is no such confusion as some judges would have us believe exists. That adjustment of damages, i. e., compensation for breach of duty, is always desirable, when possible by the parties, is the sentiment of every court; that courts are not to be imposed upon by the use of phraseology which is deceptive; i. e., not expressive of the true purposes of parties, they are equally determined; that assurances of persons competent to act for themselves, are not to be ruthlessly swept aside, is another principle governing judicial conduct in this branch of the law.

(2). *Penalties in General.* The practice which prevailed in equity with reference to relief from penalties for violations of agreements is familiar to every one. Enabling statutes have been enacted in most if not all of the States, and in England, by which courts of common law may direct an inquiry in all suits on contracts into the actual damages suffered by the breach thereof, when penalties are reserved and the administration of relief in accordance with the results of such inquiry, in derogation of the professed intent of the parties, as manifested in their deeds.[2]

(3). *Principles Governing Construction.* From the mass of cases which have been considered, may be extracted these principles:

(*a*). *When described as liquidated damages, etc.*; (1) *performance of single act.* Where an agreement is for the performance of a single act and there is no adequate means of ascertaining the precise damages which may result from a violation, the parties may if they please by a separate clause of the contract fix upon the amount of compensation payable by the defaulting party in case of a breach, and against such stipulation, equity will never interfere, and in an action at law, the jury is bound, in the rendition of their verdict, to confine itself to the sum fixed,[3] provided the sum fixed be not so plainly unconscionable[4] or so unreasonably large as to induce the belief that the parties never contemplated its payment,[5] or does not assume the character of gross extravagance or of wanton or unreasonable disproportion to the nature or extent of even possible injury,[6] or is not so extortionate or

[2] 1 Pomeroys, Eq. Juris. sec. 434 *et seq.* The general doctrine regarding forfeitures for non-payment of money has no application to the subject here considered. What is not here considered may be found well discussed in 1 Pomeroy's Eq. Jurisp. sec. 435, 436, 437, 438, 439 and notes.

[3] Miller v. Elliott, 1 Ind. 484, 488 (1849); Holmes v. Holmes, 12 Barb. 137. Courts cannot make covenants for parties, per Lord Mansfield in Lowe v. Peers, 4 Burr, 2225 (1768) repudiating Hist v. Goates, 2 Rolle's Abr. 703; Beale v. Hayes, 5 Sandf. (N. Y.) 640, 644, (1851); Tardevan v. Smith, Hardin (Ky.) 175 (1807); Westerman v. Means, 12 Pa. St. 97 (1849); Downey v. Beach, 78 Ill. 53 (1875) and cases cited; Dwinell v. Brown, 54 Me. 468; Atkyns v. Kinnier, 4 Exch. 776, (1850); Sainter v. Ferguson, 7 C. B. (M. G. & S.) 176, 730, (1849) per V. Williams, J.; Dennis v. Cummins, 3 Johns, Cas. (N. Y.) 297, 298 (1803); Hasbrouck v. Tappen, 15 Johns, (N. Y.) 200 (1818); Bagley v. Peddie, 5 Sandf. (N. Y.) 192, 194 (1851) per Sandford, J., s. c. 16 N. Y. 469 (1857); Lange v. Werk, 2 Ohio St. 519, 533 (1853); Williams v. Dakin, 22 Wend. 201 (1839); Hubbard v. Grattan, Alcock & Nap. 389; Orr v. Churchill, 1 H. Bl. 227, 232 (1789) per Lord Loughborough; Barton v. Glover, Holt, N. P. 43 (1815); Crisdee v. Bolton, 3 C. & P. 240 (1827); Farrant v. Olmius, 3 B. & Ald. 692 (1820); Mundy v. Culver, 18 Barb. (N. Y.) 336, 338 (1854); Woolf Creek Co. v. Schulz, 71 Pa. St. 180 (1872); Rolfe v. Peterson, 2 Bro. P. C. 436 (1772); Hodges v. King, 7 Met. (Mass.) 583 (1844); White v. Dingley, 4 Mass. 433 (1808); O'Donnell v. Rosenberg, 14 Abb. Pr. (N. S.) 59 (1873) Lynde v. Thompson, 2 Allen (Mass.) 456, 459, 460 (1861); Curtiss v. Brewer, 17 Pick. (Mass.) 513 (1836); Peine v. Weber, 47 Ill. 41 (1868); Brown v. Maulsby, 17 Ind. 10, 12 (1861); Hamilton v. Overton, 6 Blackf. 206, 208 (1842); Williams v. Green, 14 Ark. 315, 320 (1858); Bright v. Rowland, 3 How. (Miss.) 398 (1839); Dwinell v. Brown, 54 Me. 468 (1867); Lightner v. Menzel, 35 Cal. 452 (1868); Leary v. Laflin, 101 Mass. 334 (1869); Hussey v. Rockmore, 27 Ala. 281, 289 (1855); Leland v. Ward, 10 Mass. 459, 462, (1813); Allen v. Brazier, 2 Bailey S. C. 293; Ivinson v. Althroop, 1 Wy. T. 71 (1872); Harris v. Miller, 6 Saw. 319, 323 (1880); Williams v. Vance, 9 S. C. 344 (1877); Knowlton v. MacKay 29 U. Can. C. P. 601 (1879) citing Gainsford v. Griffith, 1 Wms. Saund, 74 (Ed. 1871); Craig v. Dillon, 6 U. C. (Ont.) App. 116 (1881); Legge v. Harlock, 10 Q. B. 1014, (1848); McPhee v. Wilson, 25 U. C. Q. B. 169 (1865); Archibald v. Wilson, 32 U. C. Q. B. 590 (1872); Hamilton v. Moore, 33 U. C. Q. B. 100 (1872); s. c. Id. 520; Hall v. Crowley, 5 Allen (Mass.) 504 (1862); Kemp v. Knickerbocker Ice Co. 51 How. Pr. (N. Y.) 31, 38 (1876); Hoagland v. Segur, 38 N. J. L. 230, 239 (1876); Farnham v. Ross, 2 Hall (N. Y. 167 (1829). Compare Gray v. Crosby, 18 Johns. (N. Y.) 219 (1820); Upham v. Smith, 7 Mass. 265 (1811); Ayres v. Pease, 12 Wend. (N. Y.) 393 (1834); See Sparrow v. Parris, 7 H. & N. 594. But the rule does not apply when the damages are easily ascertainable, Hahn v. Hortsman, 12 Bush. (Ky.) 249 (1876); White v. Arleth, 1 Bond. 319 (1860).

[4] Curry v. Larer, 7 Pa. St. 470, 471 (1848) citing Cutler v. How. 8 Mass. 257 (1811.)

[5] Watt's Ex'r. v. Sheppard, 2 Ala. 425, 445. (1841).

[6] Gillis v. Hall, 7 Phila. 422 (1870); s. c. 2 Brewst.

XUM

unjust as to raise the presumption of fraud in its inception,[7] and "such as no man in his senses and not under delusion, would, on the one hand" fix "and as no honest or fair man would accept on the other,"[8] and the damages attending a violation of the contract might under no circumstances be slight only,[9] and no fraud has been used in procuring its insertion in the contract,[10] although the sum may appear excessive.[11]

(*a*) *Reasons for the Rule.* "Parties to a contract themselves best know what their expectations are in regard to the advantages of their undertaking and the damages attendant on its failure, and when they have mutually agreed upon the amount of such damages in good faith and without illegality, it is as much the duty of the court to enforce that agreement, as it is the other provisions of the contract."[12]

(*b*). *Exception.* While the words "liquidated damages" are *prima facie* evidence of the intent of the parties to treat the sum as such, and they are almost invariably treated as almost conclusive evidence of such intent,[13] the mere use of such words does not conclude the courts;[14] but if the court, after a thorough inspection of the contract in all its provisions, and consideration of its subject-matter, and all its surrounding circumstances, the ease or difficulty of measuring the breach in damages, the situation of the parties, and the usages to which they may be understood to refer, from the whole, decide that equity and good conscience require that such sum shall be treated, not as liquidated damages, but as a penalty provided to secure the due performance of the act, and therefore subject to the chancery powers of equity courts, or the statutory powers of common law courts, they will betray no hesitation in doing so.[15]

(2). *Performance of many acts.*—(*a*). *In general.* When the sum is fixed for a breach of an agreement of many different provisions, and it is clear that the sum was contemplated to cover the damages caused by a breach of the principal stipulation[16] or if it be intended as compensation for the breach of any of all the stipulations or of any selected number there-

342; Clement v. Cash, 21 N. Y. 253, 257, (1860); Morse v. Rathburn, 42 Mo. 594, (1868); Hamaker v. Schroers, 49 Mo. 406, 407, (1872).

[7] Greer v. Tweed, 13 Abb. Pr. (N. S.) 427, 429, (1872); citing Earl of Chesterfield v. Jansen, 1 Wilson, 386; Floye v. Edwards, Cowp. 112; Jestons v. Brook, Id. 793; Baxter v. Wales, 12 Mass. 365, (1815); and Russell v. Roberts, 3 E. D. Smith, (N. Y.) 118.

[8] Story's Eq. Jur. sec. 188; James v. Morgan, 1 Lev. 111; Lindsay v. Anesley, 6 Ired. (N. C.) Eq. 186, 189, (1845); Morse v. Rathburn, 42 Mo. 594, 601, (1868).

[9] Colwell v. Lawrence, 38 Barb. (N. Y.) 643, 648, (1862); Hamaker v. Schroers, 49 Mo. 406, 408, (1872); The Savannah & Charleston R. Co. v. Callahan, 56 Ga. 331, (1876); Dullaghan v. Fitch, 42 Wis. 679, (1877); Bridges v. Hyatt, 2 Abb. (N. Y.) Pr. 449, (1856); Lee v. Overstreet, 44 Ga. 507, (1871); Jemmison v. Gray; 29 Iowa, 537, 547, (1870); Colwell v. Foulkes, 36 How. Pr. (N. Y.) 306, 321, (1868); Rutherford v. Stovel, 12 U. C. C. P. 9 (1861); Ainslee v. Chapman, 5 U. C. Q. B. 313, (1849); Brown v. Taggart, 10 U. C. Q. B. 183, (1853); Beale v. Hayes, 5 Sandf. (N. Y.) 640, (1851).

[10] Peine v. Weber, 47 Ill. 41, (1868).

[11] Gobble v. Linder, 76 Ill. 157, 160, (1875); Astley v. Weldon, 2 B. & P. 351, (1802) per Lord Eldon. Dwinell v. Brown, 54 Me. 468, 472, (1867); citing Chrisdee v. Bolton, 3 C. & P. 240, (1827); Clement v. Cash, 21 N. Y. 253, (1860); Brewster v. Edgerly, 13 N. H. 275, (1842).

[12] Dwinell v. Brown, 54 Me. 468.

[13] Leggett v. Mut. Ins. Co. of New York, 50 Barb. (N. Y.) 616 (1868); Clement v. Cash, 21 N. Y. 253, 258, (1860); Morse v. Rathburn, 42 Mo. 594, 603, (1868); Fisher v. Berry, 16 U. C. C. P. 23, (1865).

[14] Peine v. Weber, 47 Ill. 43, (1868); Low v. Nolte, 16 Ill. 475, 477, (1855); Hahn v. Hortsman, 12 Bush. (Ky.) 249, (1876); Foley v. McKeegan, 4 Iowa, 1, (1856); Williams v. Green, 14 Ark. 315, 321, (1854); Dwinell v. Brown, 54 Me. 468, 471, (1867); Bearden v; Smith, 11 Rich. (S. C.) Law, 554, 556, (1858); Grasselli v. Lowden, 11 Ohio St. 349, 361, (1860); Reynolds v. Bridge, 6 E. & B. 545, (1856); McPhee v. Wilson, 25 U. C. Q. B. 169, 172, (1866); Magee v. Lovell, L. R. 9 C. P. 107, 115, (1874); per Coleridge, C. J. Beale v. Hays, 5 Sandf. (N. Y.) 670, (1851); Hoag v. McGuinness, 22 Wend. (N. Y.) 163, 165, (1839), per Cowen, J.

[15] Gillis v. Hall, 7 Phila. 422, (1870); s. c. 2 Brewst. (Pa.) 342; Perkins v. Lyman, 11 Mass. 76, 81, (1814); Hodges v. King, 7 Met. (Mass.) 583 (1844); Williams v. Dakin, 22 Wend. (N. Y.) 201 (1839), per Chancellor Walworth; Chamberlain v. Bagley, 11 N. H. 234, (1840); Hosmer v. True, 19 Barb. (N. Y.) 166 (1854); Streeper v. Williams, 48 Pa. St. 450 (1865); Curry v. Larer, 7 Pa. St. 470 (1848); Cushing v. Drew, 97 Mass. 445 (1867); Lindsay v. Anesley, 6 Ired. (N. C.) L. 186 (1845); Foley v. McKeegan, 4 Iowa 1, (1856); Hamaker v. Shroers, 49 Mo. 406 (1872); Dwinell v. Brown, 54 Me. 468, 471 (1867); Hise v. Foster, 17 Iowa 23 (1864); Bigony v. Tyson, 75 Pa. St. 157 (1874); Grasselli v. Lowden, 11 Ohio St. 349, 361 (1860); Colwell v. Foulkes, 36 How. Pr. (N. Y.) 306, 320, (1868); Especially when it is inserted only in the formal part of the agreement. Fisk v. Gray, 11 Allen, 132 (1865); and when the sum is fixed by such expressions as "forfeit as liquidated damages," Wallis v. Carpenter, 13 Allen (Mass.) 19 (1866), or "in penalty of" or "in the penal sum of $1,000 as liquidated damages" Lord v. Gaddis, 9 Iowa, 265 (1859).

[16] Rielly v. Jones, 8 Moore, 244, 252, s. c. 1 Bing. 302; Shute v. Hamilton, 2 Hilt. (N. Y.) 462 (1871); Clement v. Cash, 21 N. Y. 253 (1860); Lea v. Whittaker, 8 L. R. 8 C. P. 70 (1872); explained in Magee v. Lovell, 9 Id. 10, 15, (1874); Hoagland v. Segur, 38 N. J. L. 230 (1876).

of, and the stipulations be of equal degree of importance, and the damage attending the breach of each would be difficult of ascertainment, and the sum be open to none of the objections mentioned in the first rule, the sum will be as conclusive upon the courts as if the agreement came within the operation of the first rule.[17]

(*b*). *Several acts not of same degree.* But when the contract contains various stipulations of very different degrees of importance, or the damage from some of which would be easily ascertainable, though the remainder might belong to that class which justifies such arrangements as to damages, and by the terms of the contract, such sum would be payable equally on the failure to perform the least as of that to perform the most important,[18] or equally on the failure to perform that one, the damage from the violation of which would be easily ascertainable as of that from the breach of which the loss would be difficult of ascertainment, it would be so plainly unconscientious to exact so large a sum for a trivial breach that, though the language be the strongest which could be employed to evince a contrary intent, it will be held that the parties could not have intended such sum as stipulated damages for the breach of any stipulation, though they have so expressly declared.[19]

[17] Dakin v. Williams, 17 Wend. (N. Y.) 448, 459 (1837); s. c. 22 Wend. 201; per Parke B. in Atkyns v. Kinnier, 4 Exch. 776, 783. (1850); per Sandford, J., in Bagley v. Peddie, 5 Sandf. (N. Y.) 192, 194 (1851); Clement v. Cash, 21 N. Y. 253 (1860); Dwinell v. Brown, 54 Me. 468, 472 (1867): Knapp v. Maltby, 13 Wend. 587 (1835); Esmond v. Benschoten, 9 Paige (N. Y.) 365; (1852); Riley v. Jones, 8 Moore 244 (18) s. c. 1 Bing. 302.

[18] Dailey v. Litchfield, 10 Mich. 29 (1862); Jacquith v. Hudson, 5 Mich. 123, (1858); Foley v. McKeegan, 4 Iowa 1, 6, (1856), followed in Lord v. Gaddis, 9 Iowa, 265 (1859); Hallock v. Slater, Id. 599, (1859); and Sweem v. Steele, 5 Id. 352 (1857); Durst v. Swift, 11 Tex. 273, 282, (1854); Lyman v. Babcock, 40 Wis. 503, 518 (1876); Cook v. Finch, 19 Minn. 407 (1872); Craig v. Dillon, 6 U. C. App., 116, 118, (1881); Colwell v. Foulkes, 36 How. Pr. (N. Y.) 306, 321 (1868); Hoagland v. Segur, 38 N. J. L. (9 Vr.) 230, 235 (1876); Magee v. Lovell, L. R. 9 C. P. 107, 115 (1874), distinguishing Lee v. Whittaker, L. R. 8 C. P. 70 (1872); Galesworthy v. Strutt, 1 Ex. (Wels. H. & G.) 166, per Alderson, B.; *Contra* Cotheal v. Talmage, 9 N. Y. 554 (1853); Clement v. Cash; 21 N. Y. 253, 259, (1860); Reilly v. Jones, 1 Bing. 302 (1823); Staples v. Parker, 41 Barb. (N. Y.) 648, 652 (1864); See McPhee v. Wilson, 25 U. C. Q. B. 169, 173 (1866).

[19] Kemble v. Farren, 6 Bing. 141 (1829) see comments in Atkyns v. Kinnier, 4 Exch. 776 (1850) per Parke, B., and in Jacqueth v. Hudson, 5 Mich. 123 (1858);

The law will not permit its policy to be evaded by mere words.

(1). *Reasons for the Rule.* The last rule is based upon the theory that when men designate one standard of compensation for violations of contracts of different degrees of importance, or the violation of one of which would be attended by a great loss, and of another by a loss entirely disproportionate to the former, they cannot have given to the matter that careful, serious consideration, and could not have made the probable loss the subject of that fair and actual calculation which influenced the courts in the formation of the first rule.

(2). *Illustration: Kemble v. Farren.* The leading case upon the second branch of the rule just stated is Kemble v. Farren.[20]

Kemble v. Farren is sustained by Bagley v. Peddie, 5 Sandf. (N. Y.) 192 (1851); s. c. overruled in 16 N. Y. 469 (1857): Davies v. Penton, 6 B. & C. 216 (1827) 9 D. & R. 369; Boys v. Ancell, 5 Bing. N. C. 390 (1839); Berry v. Wisdom, 3 Ohio St. 241 (1854); Shiell v. McNitt, 9 Paige Ch. (N. Y.) 101, 105, 106, (1841); Hand, J., dissenting in Esmond v. Van Benschoten, 12 Barb. (N. Y.) 366, 375, 380 (1852); Heard v. Bowers, 23 Pick. 455 (1839); per Sir John Coleridge in Deniech v. Corlett, 12 Moore, P. C. 199, 230 (1858); Lampman v. Cochran, 16 N. Y. 275 (1857); Jackson v. Baker, 2 Edw. Ch. (N. Y) 471 (1835); Lynde v. Thompson, 2 Allen, (Mass.) 456, 458 (1861); Beckham v. Drake, 8 M. & W. 846, 853 (1841); Homer v. Flintoff, 9 M. & W. 678 (1842); Gower v. Saltmarsh, 11 Mo. 271 (1848); Swift v. Crow, 18 Ga. 609, 611 (1855); Niver v. Rossman, 18 Barb. 50 (1853); Carpenter v. Lockhart, 1 Ind. 434, 443 (1849); Hamilton v. Overton, 6 Blackf. 206, 207, (1842); Long v. Towl, 42 Mo. 545 (1868); Basye v. Ambrose, 28 Mo. 39, ; Hahn v. Hortsman, 12 Bush. (Ky.) 249, 256 (1876); Morse v. Rathburn, 42 Mo. 594, 600 (1868); Hammer v. Breidenbach, 31 Mo. 49, 51, (1860); Foley v. McKeegan, 4 Iowa, 1, 10 (1856); Bright v. Rowland, 3 How. (Miss.) 398, 414, 415, (1839); Haldeman v. Jennings, 14 Ark. 329 (1854); Trower v. Elder, 77 Ill. 452 (1875); Lyman v. Babcock, 40 Wis. 503, 517, 518, (1876); Pierce v. Jung, 10 Wis. 30 (1859); Fitzpatrick v. Cottingham, 14 Wis. 519 (1861); Cheddick's Ex'r v. Marsh, 1 Zab. (21 N. J. L.) 463, 467 (1848); Owens v. Hodges, 1 McMullen (S. Car.) 100 (1841); Trustees' Orthodox Church, etc. v. Walrath, 27 Mich. 232 (1873); Morris v. McCoy, 7 Nev. 399 (1872); Rundell v. Schell, 4 C. B. N. S. 97 (1858); Fisher v. Berry, 16 U. C. C. P. 23, 25, (1865); Brown v. Taggart. 10 U. C. Q. B. 183 (1853); Betts v. Burch, 4 H. & N. 506 (1859); compare Reynold's v. Bridge. 6 E. & B. 528, (1856); Lea v. Whittaker, L. R. 8 C. P. 70, (1872); Reilly v. Jones, 1 Bing. 302 (1823); Knapp v. Maltby, 13 Wend. (N. Y.) 587 (1855); Esmond v. Benschoten, 12 Barb. (N. Y.) 366 (1852); see Galsworthy v. Strutt, 1 Ex. (2 Wels. H. & G.) 659 (1848); Fisk v. Gray, 11 Allen (Mass.) 132 (1865); Staples v. Parker, 41 Barb. (N. Y.) 648, 652 (1864); Cotheal v. Talmage, 9 N. Y. 551 (1854); Price v. Green, 16 M. & W. 346, 354 (1847); Williams v. Green, 14 Ark. 375, 323 (1854); Lange v. Werk, 2 Ohio St. 519, 534 (1853).

[20] 6 Bing. 141 (1829).

Though it has been questioned and repudiated by some courts as an attempt to make a contract for the parties, in derogation of their own, as an unjustifiable interference with the freedom of action of competent persons, it has withstood all hostile criticism and the array of cases which have cited it with approval and followed it, is a standing voucher for the logic of its decision. An actor made a contract not to play for five seasons with any one but the obligee, and the latter promised to pay the former £3 10 s. each night and some other small expenses. The bond provided that if either party should violate any of such promises, he should forfeit to the other the sum of £1000, *not by way of penalty, but as and by way of liquidated damages.* As a strict adherence to this language would have made the employer liable in the sum of £1000 for a neglect to pay one single night's stipend, viz., £3 10 s. the damages from the non-payment of which would be too slight for notice, and as there was nothing to indicate that this result was to be excluded, but, on the other hand, the clause covered violations of *any and all* stipulations, the court came to the conclusion that the intention of the parties, which is the "pole star" in the construction of all compacts, was not to effect so absurd a result, but merely to provide a penalty as security for the due performance of the various stipulations, and that the words employed were either inserted by mistake or for purposes of deception and to evade the well known policy of the law.[21]

[21] The justice of the rule is well illustrated by the following cases which are fair types of all which have been cited as supporting Kemble v. Farren. A physician sold out his practice for $450, to be paid in two instalments agreeing to retire from practice in the town of Gallatin, N. Y., and to board his vendee gratuitously, if he should not earn a certain amount the first year, and to furnish stable room for a horse, and to allow the vendee the use of his office, the contract providing that if "either fail or refuse to comply with the aforesaid contract, to pay to the other five hundred dollars as his damages" on the ground that sum would be forfeitable on default in the payment of a sum certain of less proportions, the court held it be a penalty. Niver v. Rossman, 18 Barb. (N. Y.) 50 (1853). The owner of a banking business at S. Ills. agreed to sell to B his safe, fixtures, and business, for $1250, agreeing not to engage in the same business in the same place, and to pay "three fold that sum in case of non compliance with foregoing recited engagements"; on the ground that this would render him liable in the sum of $3755 for non-delivery of the $1250 safe, the court held the sum to be a penalty. Trower v. Elder, 77 Ill. 452 (1875). The rule laid down, however, has not escaped criticism. "As a rule of construction or interpretation of contracts" says Christiancy, J., "it is radically vicious and tends to a confusion of ideas, in the construction of contracts generally. It is this more than anything else which has produced so much apparent conflict in the decisions upon this whole subject of penalty, and stipulated damages. It sets at defiance all rules of interpretation by denying the intention of the parties to be what they in the most unambiguous terms have declared it to be and finds an intention directly opposite to that which is clearly expressed." Jacqueth v. Hudson, 5 Mich. 123. See also Dwinell v. Brown, 54 Me. 468; Chamberlain v. Bagley, 11 N. H. 234, per Uphrain, J.; Brewster v. Edgerly, 13 N. H. 275; Clement v. Cash, 21 N. Y. 253.

(3). *When sum is not designated.* (*a*). *In General.* If the sum fixed be not designated as "liquidated" or "fixed" or "settled damages," or by some term synonymous with these, while there is a strong tendency to regard it as a penalty,[22] especially when there is any doubt,[23] in regard to the intention of the parties, which always prevails when satisfactorily ascertained,[24] *a fortiori* when the agreement is subject to any of the objections which would avoid a stipulation expressly designated as stipulated damages, as seen in the first rule,[25] as also when the contract provides for the performance of several things, and one large sum is stated at the end as payable upon breach of performance,[26] it may be

[22] Shute v. Taylor, 5 Met. 67 (1842); Moore v. Platte County, 8 Mo. 67 (1843).

[23] Whitefield v. Levy, 35 N. J. L. 149 (1871); Bagley v. Peddie, 5 Sandf. (N. Y.) 192, 194 (1851) per Sandford, J.; Astley v. Weldon, 2 B. & P. 246 (1802) per Lord Eldon; Nash v. Hermosilla, 9 Cal. 585 (1858); Shute v. Taylor, 5 Met. (Mass.) 61, 67 (1842); Baird v. Talliver, 5 Hum (Tenn.) 186 (1845); Swift v. Crow, 18 Ga. 609 (1855); Cushing v. Drew, 97 Mass. 445, 446 (1867); Foley v. McKeegan, 4 Iowa 1 (1856; Williams v. Green, 14 Ark. 315, 320 (1854), Dwinell v. Brown, 54 Me. 468. 472 (1867); Durst v. Swift, 11 Tex. 273, 282 (1854); Cheddick's Exr. v. Marsh, 1 Zab. (21 N. J. L.) 468, 467 (1848); Crisdee v. Bolton, 3 C. & P. 240 (1827); Taylor v. Sandford, 7 Wheat. 13 (1822); Smith's Adm'rs v. Wainwright's Adm'r 24 Vt. 97, 108 (1852); Burr v. Tood, 41 Pa. St. 206 (1861); Robeson v. Whitesides, 16 S. & R. (Pa.) 320; Jemmison v. Gray, 29 Iowa, 537, 547 (1870); Harris v. Miller, 6 Sawy. 319, 323 (1880). *A fortiori* when the same is plainly intended as security only. Merrill v. Merrill, 15 Mass. 488 (1819); Robeson v. Whitesides, 16 S. & R. (Pa.) 320; Graham v. Bickham, 4 Dall. 149 (1796); Law v. House, 3 Hill, S. C. 268 (1837).

[24] Lynde v. Thompson, 2 Allen. (Mass.) 456 (1861); Gobbie v. Linder, 76 Ill. 157 (1875) and cases cited; Cheddrick's Exr. v. Marsh, 1 Zabr. (21 N. J. L.) 463, 466 (1848); Moore v. Anderson, 30 Tex. 224, 229 (1867); Colwell v. Foulkes. 36 How. Pr. (N. Y.) 306, 320 (1868).

[25] Astley v. Weldon, 2 B. & P. 346 (1801).

[26] Per Justice Heath in Astley v. Weldon, 2 B. & P. 346 (1802); Per Christiancy, J., in Jacquith v. Hudson, 3 Mich. 123, 134 (1858); Shiell v. McNitt, 9 Paige (N. Y.) 101 (1841); Charrington v. Laing 3 M. & P. 587 (1829); Watts Exr. v. Sheppard, 2 Ala. 425, 445 (1841); Per Parke, B. in Atkins v. Kinnier, 4 Ex.

safely assumed that generally when the sum is unaccompanied by any terms indicating that parties regarded it as penal, if the case affords no other measure of damages equally satisfactory, which are uncertain and depend upon the discretion of the jury in a large degree and it is apparent that they have been made the subject of actual and fair calculation and adjustment between the parties, the courts will regard such sum as stipulated damages.[27]

(*b*). *Test for Determining whether penalty or liquidated Damages.* All the means employed in the ascertainment of the intention of the parties under rule I may be resorted to in the construction of agreements hereunder. Each case depends upon its own peculiar and attendant circumstances.[28] The damage done may be the subject of inquiry in order to ascertain the probable intention[29] and the certainty or uncertainty as to the extent of such damage may become the most reliable criterion in the attainment of the desired result.[30]

St. Louis, Mo. ELISHA GREENHOOD.

(Wels. H. & G.) 776; McLean v. Tinsley, 7 U. C. R. B. 40 (1850).

[27] Gammon v. Howe, 14 Me. (2 Shep.) 250, 254 (1837); Tingley v. Cutler, 7 Conn. 291 (1828); Lowe v. Peers, 4 Burr. 2225 (1768); Smith v. Smith. 4 Wend. (N. Y.); 468) 1830); Swift v. Crow, 18 Ga. 609, 610 (1855); Watts' Exr. v. Sheppard, 2 Ala. 425, 445 (1841); Cushing v. Drew, 97 Mass. 445, 446 (1867); Hamilton v. Overton, 6 Blackf. (Ind.) 206, 208 (1842); Leggett v. Mut. Ins. Co. of New York, 50 Barb. 616 (1868); Williams v. Green, 14 Ark. 315, 328 (1854); Durst v. Swift, 11 Tex. 273, 282 (1854), 12 Greenleaf, Evidence, sec. 258, 259; Gobble v. Linder, 76 Ill. 157, 159 (1875); Hise v. Foster, 17 Iowa 23 (1864); Ryan v. Martin, 16 Wis. 57 (1862); Pettis v. Bloomer, 21 How. Pr. (N. Y.) 317 (1861); 1 Sutherland on Damages, 505, and cases in note 5. The use of the words "in lieu thereof," Slosson v. Beadle, 7 Johns (N. Y.) 72 (1810) or "in default thereof to pay," Pearson v. Williams, 24 Wend. 244 (1840); s. c. 26 Ib. 630; Gobble v. Linder, 76 Ill. 157, 160 (1870), citing Sedgwick on Damages, side p. 421 are strongly indicative of an intention to treat the sum as liquidated damages.

[28] Peine v. Weber, 47 Ill. 41; Gobble v. Linder, 76 Ill. 157 (1875).

[29] Spence v. Tilden, 5 Cow. 144 (1825); Watts' Exr. v. Sheppard, 2 Ala. 425, 446 (1841).

[30] Powell v. Burroughs, 54 Pa. St. 329 (1867).

VISITORS ON PREMISES AND THEIR RISKS.

There are well-known examples of negligence in the keeping of premises adjoining a highway, and the theory on which this cause of action is founded is, that the public must be protected at all hazards while they are exercising their right of passage along the Queen's highway in the pursuit of lawful business or pleasure. There are other considerations which come into play when the only two people interested are the occupier of premises and some visitor or other person invited to or having lawful business in such premises. At first sight it might seem to be just that the visitor should take all the risks of being in his neighbor's house. But those who are in much the same position as visitors, namely, workmen invited or engaged to work in the premises, may be thought harshly treated if subject to the same rule. Hence, soon a distinction is seen to exist on the one hand between those who are mere licensees, or those who, for their purposes, desire to be on the premises of another person, and, on the other hand, between those who are there in the fulfillment of some contract, and who, to some extent, may be said to be compulsorily there for the advantage of both parties. The extent of liability in such cases involves some nice and delicate distinctions, and there are constantly arising new situations to call forth the utmost acuteness, both of its judges and juries. And everybody is more or less interested in knowing how he stands, both as regards his rights and his liabilities, for he is usually a host or a guest, an employer or a workman, by turns.

One of the leading cases on this branch of the law was Indermauer v. Dames,[1] where there were two well-considered judgments of the Court of Common Pleas and of the Exchequer Chamber. The defendant was a sugar refiner, at whose place of business there was a shaft, some five feet square and 29 feet deep, used for moving sugar. The shaft was necessary, usual, and proper for his business. When in use the shaft required to be unfenced, but when not in use it was proper to fence it in order to protect the persons moving about from floor to floor. One day the plaintiff, a journeyman gasfitter, was sent by his master to fit up a gas regulator pursuant to contract. While he was so engaged he fell down this shaft, and there was

[1] L. R. 1 C. P. 274; 2 C. P. 311.

proved to have been no negligence on his part. Hence, the question came to be whether the defendant was under any legal obligation towards the plaintiff to protect him against such a risk, or whether the plaintiff was merely in the situation of a bare licensee or guest who must take all the risks on himself. This distinction was much discussed, and the question came to be under which class he was to be ranked.

The distinction between a licensee and a contractor was thus at the root of the case, and several judges had from time to time made observations on the liability of each class of persons. The chief illustrations had formerly been drawn from the cases of servants and visitors. The servant, or other person employed, is supposed to take not only all the ordinary risks which he knows of and thinks proper to incur, but also those caused by the misconduct of his fellow-servants, until the late Employers Liability Act modified the latter rule. In the case of a statutory duty only to fence, even the knowledge and reluctant submission of the servant who may sustain an injury are held to be only elements to determine whether there has been contributory negligence. The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur the risk, were considered by the court inapplicable. It thus became necessary to consider what was the law regulating the duty of the occupier of a building with reference to persons resorting thereto in the course of business upon his invitation express or implied. The common case was that of a customer in a shop, for whether he was actually chattering at the time or actually buying or not, he was, according to the authorities, entitled to the exercise of reasonable care by the occupier to prevent damages from unusual danger of which the occupier knew or ought to know, such as a trap-door left open unfenced and unlighted. This protection did not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer had come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business which concerned him. And if a customer were after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit which was for his benefit. And if, instead of going himself, he were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belonged included all persons who went, not as mere volunteers, or licensees or guests, or servants, or persons whose employment was such that danger might be considered as bargained for, but who went upon business which concerned the occupier, and upon his invitation express or implied. With respect to a customer it was settled law, that he, using reasonable care on his part for his own safety, was entitled to expect that the occupier should, on his part, use reasonable care to prevent damage from unusual danger which he knew or ought to know, and as to which there was this evidence of this neglect.

Such were the views of the Court of Common Pleas in Indermaur v. Dames, and it is enough to say that the court came to the conclusion that the gasfitter was not in the class of visitors or guests, but of contractors, and, therefore, that the occupier was bound to protect the plaintiff against such hidden dangers as an unfenced shaft. When the case was appealed to the Exchequer Chamber, it was again fully argued and carefully considered by five judges, and the judgment was affirmed. The court held that when a contract is entered into for the performance of work, and if, in the course of the performance of that work, workmen have to go by these places, and know nothing of the premises, the employer or occupier was bound to put up a fence or some safeguard, or to give reasonable or intelligible notice to persons going on the spot; in fact, to give notice that there is an unfenced hole, and so to put them on their guard.

In such cases accordingly the struggle must always be to bring the plaintiff within the class of contractors who are invited upon the premises for the purposes of business, and to

exclude him from the class of mere visitors, guests, and servants. This was further illustrated by the case of Holmes v. North Eastern Railway Company,[2] where the plaintiff had ordered some coals to be sent to a railway station. The practice at the station was for the consignees to assist in tipping the trucks. For this purpose the plaintiff, to whom coals had been consigned, went along the flagged way, and was stepping down from the wagon after getting his coals when some of the flags being in a defective condition, gave way, and he was thrown down into the cell and sustained severe injuries, in respect of which he sued the railway company. The contention was whether the plaintiff came within the category of a mere licensee, or whether he came within the class of contractors who went on business common to both parties. The court held he was not a mere licensee, but came within the class of contractors. The station master had acquiesced in the plaintiff's going for the purpose of unloading in the way he did unload, and there had been a general practice of going to assist in unloading, though in a somewhat different way. The plaintiff and the defendant had a common interest in the delivery and the receipt of the coals, and so the case was substantially different from that of a mere licensee.

These cases thus establish the main distinction between two classes, in one of which classes a party takes all the risk as it were, and in the other does not, but requires to be specially guarded against anything like a trap or hole of which he may be quite ignorant. But even in the latter case the plaintiff must be sure that he does not contribute to the accident by negligence of his own; and this last question must always be left to the jury. The general distinction of licensees was also shown in the case of Ivay v. Hedges,[3] where the plaintiff was a tenant of apartments and obtained a license from his landlord to use, if he liked, a certain leaden roof to dry his clothes. The plaintiff went one day upon the roof for the purpose of removing some linen, which was there, when his foot slipped, and the rail which was on the roof happened to be out of repair, and this was known to the landlord. This rail, when the plaintiff leaned upon it, gave way and he fell through into the courtyard below, and was injured. He sued the landlord, but the court held that inasmuch as the plaintiff had a mere license to use the roof if he wished, and there was no contract between them as to that matter, he must take it with its risks, and so that there was no duty upon the defendant to fence it or keep the fence in repair, and so no cause of action arose.

A recent case of Bachelor v. Fortescue,[4] belongs to the same class of cases. The action was brought under Lord Campbell's Act to recover compensation for negligence by causing the death of Henry Bachelor. The defendant had contracted to do certain work on a plot of ground where buildings were erected, and excavations were going on. To carry out the work the defendant, by his men, worked a steam winch and crane, with a chain and iron tub attached thereto. The winch and crane, with chain, were placed on the upper edge of the land which was contiguous to the face of the earth which was in course of excavation. The mode of working the engine was this. The iron tub was first filled with earth weighing some 15 cwt.; then the steam winch hoisted the tub up to the level of the ground surface; the crane then swung it round to where a cart was standing to receive the earth, and into it the contents of the tub were emptied. By continuously repeating the operation the excavations were carried on. The deceased man was employed by the owner of the ground to watch the materials and buildings, and one day he was watching the defendant's men at work. He had no duty to take part in the excavating, and it was no part of his business to stand under the tub as it was raised. But he happened to be immediately under the tub when the chain broke, and the tub and its contents fell upon the deceased and caused injuries from which he died. The judge, on hearing the evidence, considered that the deceased man was in the position of a mere licensee, for though he was there to watch the materials and buildings, he had no business with the machinery, nor any duty to watch the defendant's men at their work. He was thus in a place where he had no right to be, and

[2] 9 L. R. 4 Ex. 257.
[3] Q. B. Div. 80.
[4] 47 J. P. 308.

was a mere licensee, and so the defendant owed no duty to protect him from the danger.

That case has been taken to the Court of Appeal, and the judgment has been affirmed. The latter court said there was nothing to show that the defendant's men had any reason to suppose the deceased would be at the spot where he was, since he was under no duty, and the defendant, therefore, was likewise under no duty to see that the deceased man did not go into danger.

These cases seem to treat the distinction as pretty well settled between the bare licensee and the contractor. It would be endless if the host or master of a body of domestics, was bound to protect the guest or the servants from all the dangers which may be incurred on premises. Each must take care of himself. But when a strange workman is sent under a contract it seems good sense that the rule should be, if not the reverse, at least greatly modified. The workman is there to do work under a kind of compulsion, and must run risks which he cannot be supposed to either undertake or guard against. Hence it lies on the occupier of the premises to take some pains to guard and caution the workman. Notwithstanding this rule and its distinctions, a vast variety of complicated circumstances and situations will probably continue to give rise to exercise the astuteness of courts and juries, for business cannot be done without this kind of work being contracted for, and without these risks being encountered.—*Justice of the Peace.*

REMOVAL OF CAUSES—SEPARATE CONTROVERSY.

[WILSON v. ST. LOUIS, ETC R. CO.

United States Circuit Court, E. D. Missouri, September 25, 1884.

A defendant in a bill brought by a citizen of another State, against a corporation of the same State, to compel it to transfer to him stock standing in the name of the first, can not have the cause removed to the Federal court as a separate controversy between him and the complainant.

Motion to remand.

MILLER, Circuit Justice, delivered the opinion of the court:

The case of Wilson v. St. Louis & San Francisco R. Co., and the Seligmans, submitted to us yesterday on a motion to remand, was brought to the State Courts and removed here.

The question is presented in this manner: Wilson, who had recovered a judgment against the Memphis, Carthage & Northwestern R. Co., had an execution returned "no property found," and then took proceedings under the laws of Missouri concerning such cases, to subject the stockholders to personal liability, and in those proceedings he obtained an order against the Seligmans, with an execution issued against them for some seventy odd thousand dollars. Under that execution the sheriff levied upon and sold certain stocks standing in their names on the books of the St. Louis, etc. R. Co., and gave the usual certificate of sale. Mr. Wilson finding that certificate unavailing, because the St. Louis, etc. R. Co. would not recognize his right in the premises, filed this petition in the State Court in the nature of a bill in Chancery, to compel the R. Co. to acknowledge his interest in the stock, to have it registered on their books in his name, and to permit him to receive dividends, vote, and otherwise exercise the functions of a stockholder in that company. He also made the Seligmans parties, on the ground that the stock stood in their names on the books of the company, and averring that he had acquired their interest, and in that state of case, the Seligmans, filing their answer (in which they stated that they did not own the stock at the time the judgment was rendered against them, nor at the time of the sale to Wilson, but had parted with it, and that the certificates were then, and ever since had been in the hands of persons to whom they sold, whose names they do not give), say it was sold in the ordinary business way, by endorsement with blank power of attorney, and that they do not know where it is; at all events, they assert very roundly that they have no interest in the stock itself—no equitable interest—although it stood in their names on the books at the time of filing the answer of the railroad company.

Application was made by Seligman, as a citizen of New York, on the ground of his citizenship in New York, to transfer the case to this court, and it was done by order of the State Court. It is now moved to remand it on the ground that it was not a removable cause, and the question that is presented is rather a question of fact than any needed new construction of the law on the subject of removal for the courts have decided, and it has been decided frequently, so that the doctrine must be pretty well established at this time, that if a non-resident party has an interest in a controversy which is separate and distinct, and does not necessarily involve the interest of the other defendants in the issue, or the other party on the same side, he can remove the whole case into the Federal Courts. On the other hand, if the interests of the parties are so identified and so mixed up that they must, and should be decided together, and depend under the final decree, and must depend upon and involve the rights of both parties, then it cannot be removed, where one of the parties is

a citizen of the same State with the plaintiff or defendant.

I think such is the case here. The main relief sought, which would satisfy Wilson, is that he be placed on the books of the St. Louis, etc. R. Co., as the owner of that stock. To do that, that company has something to do. They resist him. The powers of this court are called into operation to compel them to do that thing. Whether they should do it or not, depends upon the fact whether Wilson is a rightful owner of that stock, and that depends upon whether the sale of the stock was properly made, and whether he (Wilson) acquired the right to the stock which stood in the name of the Seligmans on the books of the railroad company, as the owners of the stock ought to be bound by any decree which makes the transfer out of their name into Wilson's name.

If they are not bound by it, the act is of very little value to Wilson. If they can go on and show they owned the stock, or that some vendee of theirs owned the stock, why Wilson gets no good of that. He has the right, therefore, that the question in whose name the stock stands on the books of the company shall be before the court, that the decree shall bind him at the same time that it binds the railroad company. The act to be done, the interests sought to be enforced against both these parties, effects both, and both should be bound by it, and therefore it is a case not transferable to the Circuit Court of the United States because the railroad company is a citizen of the same State with Wilson, the plaintiff. The case will be remanded.

I wish to suggest, however, as I have done several times of late on the Circuit, that these cases of removal, when remanded, if the court commits an error, it is speedily remediable in the Supreme Court of the United States. Take this particular case in which the order to remand is made. The other party can take a writ of error to-morrow, have the record filed in the Supreme Court of the United States on the first day of the term, go there and make his motion to have the case advanced and heard, prepare his brief, submit it to the court, and it can be decided within ten days from the second Monday in October. The court has found this trouble in these cases, that where a case is not remanded, the court goes on and exercises jurisdiction, and it comes upon a writ of error afterwards, but in cases where it is remanded the Federal Courts suspend and do nothing at all. Our court has felt the necessity of bringing that class of cases within the rule of advancement, so that they are advanced and heard out of their order always when the party against whom the judgment is rendered takes the necessary steps to have it reversed. So, it is with less hesitation that we order the remanding of this case, from the fact that by the first day of November, Mr. Seligman can have the question decided by the Supreme Court of the United States, whether we shall change the order or not.

NOTE.—The legal principle decided in this case is quite well settled, yet as each case presents its own facts, and sometimes peculiar facts (as in this case), the proposition will never cease to be of interest. Under the removal act, as modified by Congress from time to time, many difficult questions have arisen, calling for frequent interpretation.

The rule with reference to Federal jurisdiction, concerning citizenship, as provided by the act of March 3, 1875, and as construed by the late cases, is that if the real controversy is wholly "between citizens of different States," who are necessary parties, (not nominal parties merely), the case is one of Federal cognizance. And the same rule applies with respect to the removal of causes, as the same general language is used in the section conferring original jurisdiction and in the section conferring jurisdiction by removal. Act of March 3, 1875, secs. 1 and 2, Desty's Federal Procedure, pp. 71-2, see Pacific R. Co. v. Ketchum, 101 U. S. 297. In the Removal Cases (100 U. S. 457) it was held that the section regarding removal of causes meant, that when the controversy about which the suit is brought is between citizens of different States the courts of the United States will take jurisdiction without regard to the position the parties occupy in the pleadings as plaintiffs or defendants. For the purposes of jurisdiction the court has power to ascertain the real matter in dispute, and arrange the parties on one side or the other of that dispute. If in such arrangement it appears that those on one side were all citizens of different States from those on the other, jurisdiction may be entertained and the cause may be proceeded with. See Dillon on Removal of Causes, (3rd ed.) sec. 29, p. 34. The Removal cases were approved in Burke v. Flovet, 1 Fed. Rep. 541; Ayres v. Chicago, 101 U. S. 184; Bible Society v. Grove, 101 U. S. 610; R. Co. v. Ketchum, 101 U. S. 289. A removal under the act of March 3, 1875, is only allowable when the whole suit can be removed, and when the real controversy is so completely between citizens of different States, as opposing parties, that, when the questions on which they are opposed are decided, the whole of the controversy between the real adversary parties will be thereby determined. Dillon on Rem. of Causes, sec. 25, p. 31. If a non-resident party has an interest in a controversy which is separate and distinct, and does not necessarily involve the interests of the other defendants in the issue, or the other parties on the same side with him, the whole cause is removable. It is otherwise if the interests can not be so separated; see Canahar v. Brannan, 7 Biss. 497; s. c. 5 Cent. L. J. 114; Girardey v. Moore, 3 Woods C. C. Rep. 397; s. c. 5 Cent. L. J. 78; Hervey v. Ill. etc. R. Co., 7 Biss. 103. If the essential controversy is between citizens of the same State, a non-resident defendant interested in a collateral branch thereof, cannot remove it; Smith v. St. Louis Mut. Life Ins. Co. 2 Tenn. Ch. 656; s. c. 4 Cent. L. J. 563; Chicago v. Gage, 6 Biss. 467; s. c. 8 Chicago Legal News, 49. The act of 1875 contemplates a removal of the whole suit. Osgood v. Chicago, etc. R. Co. 6 Biss. 330; s. c. 7 Chicago L. News, 241; Ruckman v. Ruckman, 1 Fed. Rep. 587; Burch v. Davenport, etc. R. Co., 46 Iowa, 447; Ellerman v. New Orleans, etc., R.Co., 2 Woods C.C. Rep.120; Chicago v.Gage, *supra*. Therefore, citizenship of nominal parties or of aliens who do not constitute the entire party on one or the other side, will not give a right to a removal of a cause. Hervey v. Ill. etc. R. Co. 7 Biss. C. C. 103; Arrapahoe Co. v. K. P. R. Co. 4 Dill. C. C. 277; s. c. 5 Cent. L. J. 102.

Nominal parties are those not necessary to a determination of the real controversy, and will not defeat a removal. Mayor etc. v. Cummings, 47 Ga. 321;

Wood v. Davis, 18 How. 467; Ward v. Arradondo, 1 Paine, 410; Arrapahoe Co. v. K. P. R. Co., 4 Dill. 277; s. c. 5 Cent. L. J. 102, opinion per Miller, J.; Calloway v. Ore Knob Co., 74 N. C. 200; Edgerton v. Gilpin, 3 Woods C. C. 277; Gudgee v. Western N. C. R. Co. 21 Fed. Rep. 81; Mut. Life Ins. Co. v. Champlin, 21 Fed. Rep. 85. Therefore the fact that the plaintiff and garnishee are citizens of the same State is no obstacle to removal, Cook v. Whitney, 3 Woods C. C. 715. So officers of a corporation, joined with it as defendants to a bill in equity, but as to whom no relief was prayed in their individual capacity, and no relief which was not asked as against the corporation, are nominal parties in such a sense, as not to defeat the right of removal, if the right otherwise exists. Hatch v. Chicago, etc. R. Co., 6 Blatchf. 105. In Blum v. Thomas, (16 Reporter, 732; s. c. 18 Am. L. Review, 180,) the defendants were members of a commercial firm, one of the partners residing in New York, and the other residing in Texas, as did the plaintiff. The suit was an action of tort. The cause was held not removable, because of the residence of one of the partners in New York. The action against the partners could not be separated, their interests were joint. See Corbin v. Van Brunt, 105 U. S. 577; Hyde v. Ruble, 104 U. S. 407; Blake v. McKim, 103 U. S. 336; R. Co. v. McAllister, 1 Texas Law Rev. 257; Barney v. Latham, 103 U. S. 205; Clark v. R. Co., 11 Fed. Rep. 35; Bates v. Days, 11 Fed. Rep. 528; Van Brunt v. Corbin, 14 Blatchf. 496; Patterson v. Chapman, 13 Id. 395. The removal act permits a removal to the Federal Courts only when in a pending suit there is a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different States from those upon the other, and when it can be fully determined as between those parties. Thus, in a suit to reform a deed, the defendants are the holders of the legal and equitable title to certain premises, which title would be destroyed by reforming the deed as prayed, and a person claiming as lessee under the trustee, all the said defendants are necessary parties to the bill, or if any one of them is a citizen of the same State as the plaintiff, the cause is not removable. N. J. Zinc & Iron Co. v. Trotter, (17 Reporter, 4,) U. S. C. C., D. of N. J., Oct., 1883; s. c. (Digest) 18 Am. Law Rev. 180; see also Barney v. Latham, 103 U. S. 205; Mansfield R. Co. v. Swan, 4 Sup. Ct. Rep. 510; s. c. 111 U. S. 379.

EUGENE MCQUILLIN.

St. Louis, Mo.

CONTRACT—EXECUTION BY AGENT—LIABILITY OF PRINCIPAL — STIPULATED DAMAGES.

BRADSTREET v. BAKER.

Supreme Court of Rhode Island, July 12, 1884.

1. A sealed contract made by the "A Company" in the body thereof by "B Agent" but signed and sealed by "B Agent," is nevertheless, the deed of the company.

2. A contract for the sale of goods, providing that the vendor should pay for all goods not received and paid for by a certain date while the title thereof should remain in the vendors, provides for a penalty and not liquidated damages.

The parties made a sealed agreement regarding the sale and delivery of ice to the defendants. The instrument began, "Agreement made this * * * between the A company, party of the first part, by B, agent, and C and D, parties of the second part, witnesseth." In the instrument the parties were spoken of merely as "the said party of the first part" and "the said parties of the second part." The testimonium clause was: "In witness whereof, the parties have hereunto affixed their hands and seals the year and day first above written." It was signed "B, agent." [L. S.] and by the defendants. The instrument provided that the A company was to furnish, and defendants were to receive, between certain dates, five thousand tons of ice at a specified price, and that defendants were to pay in full, in cash, at the same price for all the ice not received by them at the last date; such ice not received to remain the property of the A company. Defendants made default by not receiving the ice.

DURFEE, C. J., (after stating the facts):

The defendants contend that the execution was ineffectual because the instrument does not contain the signatures of the party of the first part by their agent, but only the signature of the agent himself. Undoubtedly, in the execution of a deed by an agent the most approved form is for the agent to sign the name of his principal, writing his own name below, with the word "agent" following, and the preposition "by" preceding it. See City of Providence v. Miller, 11 R. I. 272, 277, and cases there cited. But the form is not material provided it appears on the face of the instrument that the deed was executed by the principal acting through his agent, and not by the agent himself. In Wilkes v. Back, 2 East, 142, an arbitration bond was given by Mathias Wilks for himself, and under a power, for his co-partner, James Browne. The signatures were affixed as follows, to-wit: "Mathias Wilks, [L. S.]"—"For James Browne, Mathias Wilks, [L. S.]" The court of Kings Bench decided that the execution was good. "Here the bond was executed," say the court, "by Wilks, for and in the name of his principal; and this is distinctly shown by the manner of making the signatures. Not even this was necessary to be shown, for if Wilks had sealed and delivered it in the name of Browne, that would have been enough without stating that he had so done." The case was followed with approval in Mussey v. Scott, 7 Cush. 215, where the form of the signature was "B, for A." It was also followed by the Supreme Court of Vermont in McDaniels v. Flower Brook Manuf. Co., 22 Vt. 274. There the operative clauses were in the name of the corporation "by William Wallace, their agent;" the covenants were in the name of the corporation. The deed concluded, "In witness whereof we have hereunto set our hand and seal," and the signature was "William Wallace, Agent for the Flower Brook Manufacturing Company." The court said that the execution in connection with

what preceded it, must be understood to be an execution in the name of the company. And see to the same effect Martin v. Almond, 25 Mo. 313. It seems to us that there is no material distinction between these cases and the case at bar. The case at bar would be identical with them if the words "for the Centennial Ice Company" had been added to the signature. But those words if added would express nothing which is not expressed without them by the signature taken in connection with the *testimonium* clause and covenant which precede it. The seal is stated in said clause to be the seal of the principals, and the hand to be their hand, evidently because the agent signed for them. In Abbey v. Chase, 6 Cush. 54, and Ellis v. Pulsifer, et. al., 4 Allen 165, the Supreme Judicial Court of Massachusetts decided that such an execution did not bind the agents, the action being against the agents, but expressly refrained from saying that it did not in their opinion bind the principals. See also Varnum, Fuller & Co. v. Evans, 2 McMullan 409; Hunter's Adm'rs v. Miller's Exec'rs, 6 B. Mon. 612; Bryan v. Stump, 8 Grat. 241; M'Ardle v. The Irish Iodine Company, 15 Ir. C. L. R. 146. It is true that some of the text books say and some of the cases seem to imply that the name of the principal must necessarily appear in the signature. But we do not see the necessity. When A being agent for B, signs the deed "A for B," or "A, agent for B," his own name is the signature, the other words being used to denote that he makes the signature not for himself but for his principal. And surely if this be so, it is unnecessary to use those words, if the thing which is denoted by them be otherwise apparent.

The defendants cite and rely on Townsend v. Corning, 23 Wend. 435; Townsend v. Hubbard, 4 Hill, 351; Brinley v. Mann, 2 Cush. 337; Lessee of Clarke v. Courtney, 5 Pet. 319, 350; but in each of these cases the deed was not only signed in the name of the agent, but the seal was stated in the testimonium clause to be his seal. Of course the deed could not be the deed of the principal unless the seal was his seal. Indeed in Townsend v. Hubbard, *supra*, Chancellor Wallworth declared that no particular form of words is necessary to make the deed the deed of the principal, provided it appears upon the face of the instrument that it was intended to be executed as the deed of the principal, and that the seal affixed to the instrument is his seal and not the seal of the attorney or agent merely." In Bellas v. Hays,5 Serg. & R. 427, likewise cited for the defendants, it did not appear that the seal was the seal of the principal, there being no *testimonium* clause, and it was assumed to be the seal of the agent. The agent moreover signed his own name simply, without the word "agent" appended. The counsel for the defendant quotes the words of Judge Story in Lessee of Clarke v. Courtney, *supra*, that "the law looks not to the intent alone, but to the fact whether that intent has been executed in such a manner as to possess a legal validity." Undoubtedly. But, in his work on Agency, Judge Story, treating of this matter, says: "In all cases where the instrument purports on its face to be intended to be the deed of the principal, and the mode of execution of it by the agent, however irregular and informal, is not repugnant to that purport, it would probably be construed to be the deed of the principal, especially where the *in testimonium* clause is that the principal has thereto affixed his seal." Story on Agency sec. 153, cited in Martin v. Almond, *supra*.

Our conclusion is that the plaintiffs were bound by the contract and therefore that the action can be maintained.

2. The second question is, can the plaintiffs recover the stipulated price of the thousand tons as liquidated damages? We think there can be but one answer to this question, namely, that the stipulation is a stipulation for a penalty. It is impossible that the plaintiffs retaining the ice can be entitled by way of indemnity to all which they would have received for the ice if it had been delivered. In Scofield v. Tompkins, 95 Ill. 190, the defendants agreed to buy the land of the plaintiff and pay for it by a given day, and that if they made default, the plaintiff should retain the land and recover the stipulated price as liquidated damages. The court held that the stipulation must be treated as a stipulation for a penalty. The case is exactly in point. The purpose in both cases doubtless was to insure the timely fulfillment of the contract by the *in terrorum* forfeiture. The actual damages, if any, can be easily proved.

NOTE.—1. The first point of the case has been recently exhaustively treated by Benj. F. Rex, Esq., in an article on "Liability of Agents on Unsealed, Non-negotiable Instruments," 19 Cent. L. J. 182. 2. The second point was likewise treated by Isaac N. Payne, Esq., in an article on "Liquidated Damages and Penalties." 18 Cent. L. J. 143. See also article in current number, p. 282.—(EDITOR.)

ASSIGNMENT OF CONTRACT—NOVATION—SET OFF—CONSIDERATION—STATUTE OF FRAUDS—PRESUMPTION.

TROW v. BRALEY.

Supreme Court of Vermont.

A owed B for work; B assigned the debt to C; C gave notice to A, and A promised to pay it, but it did not appear to whom. *Held*, (1), that there was a complete novation; (2), that A could not offset a note which B had given to a third party, and which was held by A when notified of the assignment, but gave no intimation that he owned it, especially as the note was payable to order, andnot endorsed; (3), that there was a valuable consideration for the promise; (4), it was not within the Statute of Frauds, (5), and it is presumed to have been made to C.

ROSS, J., delivered the opinion of the court.

This action is to recover the contract price for job of work done by the plaintiff for the defend-

ant. The contract was assigned to George W. Soper, October 14, 1879, and notice thereof given to the defendant the next day. This suit is prosecuted for the benefit of Mr. Soper. The contract was performed to the acceptance of the defendant October 31, 1879, and he then promised to pay, and gave no notice that he held any claim in offset. The defendant's promise to pay then made, was in legal effect a promise to pay the party entitled to receive payment. That party was Mr. Soper. After the defendant had received notice of the assignment of the claim, he could discharge the claim only by payment thereof to the assignee. The agreed case does not state to whom the defendant in fact made this promise. With nothing stated to the contrary, the legal presumption is that the promise was made to Mr. Soper, to whom alone payment could then be legally made. It appears that before the assignment of the contract, the defendant had become the owner of a negotiable promissory note given by Trow to Allen, which he now claims to set off against the contract price for the performance of the work. He gave no notice of his ownership of the note when he was notified of the assignment of the contract to Soper, nor when he promised to pay on the completion of the work, October 31, 1879. The note was payable to the order of Allen and not endorsed. He could not at that time have maintained an action thereon in his own name; and it is questionable if it had accrued to him within the meaning of the statute relative to offsets. R. L. s. 919. But however that may be, this suit being prosecuted for the benefit of Soper, on the other facts, Stiles v. Farrar, 18 Vt. 444, is in point, and decisive of this case. It is there held that a promise, by the maker of a non-negotiable note to pay it to the assignee, is an acquiescence in the assignment, and a waiver of an offset which he then had against the payee in a suit thereon in the name of the payee for the benefit of the assignee. It could not well be otherwise held. Such promise completed a novation of the payee. The assignment when brought to the notice of the maker, was a request from the payee to him to substitute the assignee, in place of the assignor as payee of the non-negotiable contract. The promise by the maker to pay the contract to such assignee, is an agreement to accept the assignee as such payee in the place of and at the request of the assignor. Thus the novation is complete. Doubtless, the assignor could maintain an action in his own name on such promise for the recovery of the sum so promised to be paid him; and the maker would have no right to offset any claim which he then had against the original payee, unless he qualified his promise of payment, by reserving the offsets then held by him, and "available against the original payee. Without such qualification of his promise his offsets thereafter would be such as he held against the assignee or new payee of the contract. The assignment of the debt, for a valuable consideration with notice to the debtor, is a sufficient consideration for his promise to pay the same to the assignee as shown in Stiles v. Farrar, *supra*. The promise, though not in writing, being a promise to pay his own debt is not within the Statute of Frauds. On this view of the facts and law governing the case, without considering other questions made in argument, the judgment of the county court for the contract price for the work, and denying the right to offset the Allen note is affirmed.

ATTACHMENT—LETTING ON SHARES—INTEREST OF LANDLORD.

LONG v. GREEN.

Supreme Court of Pennsylvania.

The interest of a landlord in the crops of his land let on shares can not be attached while they are in the ground so to give title to it as against a subsequent purchaser of the land on execution against the land owner.

Error to the Court of Common Pleas of Cumberland county.

Cyrus Allison was the owner of a farm leased to and in the possession of his son, David Allison, on a lease from year to year, and terminating April 1, 1880. The lease was upon shares. Isaac Meals had a judgment against Cyrus Allison on which he issued an execution, levied on grain growing in the ground as the property of Cyrus Allison, and on November 1, 1879, sold it to Jacob Seavers. On another judgment an execution was issued, the land levied upon and an amicable condemnation given of it by Cyrus Allison, and after return of this execution on December 9, 1879, a writ of *venditiona exponas* was issued, upon which the land was sold by the sheriff to C. Long. The writ was returned January 12, 1880, and a deed was made by the sheriff to C. Long for the land. David Allison continued on the property as tenant of C. Long, the purchaser, from and after his purchase, and continues so now. The grain was harvested in the year 1880, and was delivered to David Allison, the tenant for C. Long to Ira L. Long and John L. Barner, and some to other parties. Jacob Seavers, the purchaser of the crop at the sale of November 1, 1879, brought suit to recover the value of the wheat so delivered. The court gave binding instructions to the jury to find on this point for the plaintiff, that the sale of November 1, 1879, passed the landlord's share of the crop to Jacob Seavers.

Henderson & Hays, for plaintiff in error; *J. A. C. McCune*, for defendant in error.

GREEN, J., delivered the opinion of the court.

It is true that grain growing in the ground is personal property and may be seized and sold upon execution: Hershey v. Metzgar, 9 Norris, 217. But that proposition in its generality relates

to the interest in the grain, of the person in possession. When land is leased by the owner to a tenant upon shares, the landlord is entitled to his share of the grain when it is harvested: Lamberton v. Stouffer, 5 P. F. Smith, 284. Before that the landlord cannot enter upon the land demised, to take his share, or do any other act inconsistent with the tenant's right of possession. Under the Act of June 16, 1836, Purdon, 663, pl. 149, it is undoubted that the purchaser of the landlord's title under execution against him, is entitled to the rent falling due after the acknowledgment of the sheriff's deed, whether it is payable in money or grain. Where, however, there has been a severance of the landlord's share of the grain before the sheriff's sale of the land, that share does not pass by the sale. All this was ruled in Hershey v. Metzgar, *supra*. The test is the severance. In Hershey v. Metzgar there was a levy under a *fieri facias* upon the owner's interest in his growing grain, and he elected to take the grain under the exemption law, and it was appraised and set apart to him, with the knowledge and without the objection of the plaintiffs in the judgment, who subsequently purchased the land. This was held to be a severance. In Fullerton v. Schauffer, 2 Jones, 220, it was held that when by the terms of the lease the tenant was to retain the rent, and apply it to the payment of a debt of the lessor, for which the tenant was surety, this was such an appropriation of the rent in advance, that no rent was due after the subsequent sheriff's sale of the land, and hence none passed to the purchaser. In the present case the question is, whether sale upon a *fieri facias* of the landlord's share of the growing grain, before actual severance works, of itself, such a severance as passes his title to it, as against a subsequent purchaser of the land. If the share were a subject of levy and sale upon a *fieri facias* of course this result would be accomplished. But we think it is not. The landlord has no title to his share of the grain until it has been harvested: Lamberton v. Stouffer, *supra*. The whole of the grain while it is growing belongs to the tenant, and he must deliver to the landlord his share of it after severance. This, of course, is in the absence of special contract to the contrary. Thus we said in Rineheart v. Olwine, 5 W. & S., 163: "Then as to the title of a tenant to the grain in the ground where by the terms of the lease the landlord is entitled to a share of it, deliverable in the bushel, the better opinion seems to be, that it is the property of the tenant, and until the grain is severed and delivered to the landlord he has no interest in the thing itself. If he sells it, it goes to his vendee, and the landlord cannot pursue it in his hands." We held the same doctrine in Ream v. Harnish, 9 Wright, 376, THOMPSON, J., saying, speaking of the landlord's share, "until delivered by the tenants the landlord had no title to any part of it." Stambaugh v. Yeates, 2 Rawle, 161, is cited by the defendant in error as ruling that a sheriff's sale upon a *fieri facias* of the landlord's interest in the growing grain under a lease on shares, would pass title as against a subsequent purchaser of the land at sheriff's sale. Without discussing that case at length it is enough to say that after what has been said of it by this court on different occasions, it cannot be regarded as authority for that extreme doctrine. Judge Kennedy thus speaks of it in Bank of Pennsylvania v. Wise, 3 Watts, 405; "It has also been urged that rent comes in lieu of the emblements of the land, and that as it has been ruled by the court in the case of Stambaugh v. Yeates, 2 Rawle, 161, and recognized in Meyers v. White, 1 Id., 356, that the purchaser at sheriff's sale is not entitled to the emblements, he ought not, for the same reason, to have rent, or at least such rent as might by an apportionment be considered a proper equivalent for the enjoyment of the land up to the time of the sale. In answer to this it may be sufficient to state that the law makes a very different disposition of the corn or grain growing on the land at the death of the owner in fee where it was sown by him, from what it does of the rent which has not become payable at the time of his death, for land of which he dies the lessor and owner in fee. In the first case the grain growing upon the land is considered personal estate, and as such goes to the executor or administrator; but in the latter case the rent is considered as appertaining to the real estate, as incident to the reversion in fee, and passes with it to the heirs." An examination of the opinion in Stambaugh v. Yeates shows that it was decided upon the general principle that grain growing in the ground is personal property, and therefore is subject to levy and sale upon a *fieri facias*. There was no attempt to distinguish between grain growing on land occupied by the owner and that which was growing upon land leased to a tenant. The decision was followed, however, in the case of Smith v. Johnson, 1 P. & W., 471, in which it was held that by a sale, conveyance and delivery of possession of land, the grain growing thereon does not pass to the vendee. Stambaugh v. Yeates was decided in 1828, and Smith v. Johnson in 1830. The latter case came up again in 1832 as Johnson v. Smith, 3 P. & W. 496, and its apparent doctrine was practically reversed by holding that the landlord's right to the share reserved by the lease did pass to the purchaser, unless separated by an express reservation. Judge Kennedy described the interest of the landlord with more accuracy than had before been observed. He said, on page 501: "He parted with his right and all claim to the products of the land while growing upon it, during the continuance of Smith's interest in the possession and use of the same, under his contract with Clark as completely as if he had let the farm to Smith for a money rent. Clark therefore had no right whatever to an interest in the grain grown by Smith, and growing upon the land at the time he sold and conveyed it to Johnson." In Wilkins v. Vashbinder, 7 Watts, 378, it was held that a conveyance of land con-

veys the grain growing upon it to the purchaser, and that the case of Smith v. Johnson, 1 P. & W., 471, was erroneously decided. In Cobel v. Cobel, 8 Barr, 346, Coulter, J., said: "There have been conflicting decisions by this court upon the question whether grain growing is personal property or not. In Stambaugh v. Yeates, and subsequently in Johnson v. Smith, it was held that it was personal property and did not pass with a conveyance of the land. But in the case of Bank v. Wise, 3 Watts, 394, where the point incidentally arose, it was ruled that grain growing on the land did pass by the conveyance of the fee unless specially reserved." Judge Coulter evidently referred to Smith v. Johnson, and not to Johnson v. Smith, as the latter case holds the opposite doctrine, and the error is repeated a few sentences further on in his opinion. In the case of Bittinger v. Baker, 5 Casey, 68, Lowrie, J., referring to Stambaugh v. Yeates, Smith v. Johnson, and also to Meyers v. White, 1 Rawle, 353, said: "But we can make no use of them, for they are all erroneous, and have all been corrected by the decision, declaring that all rent in grain or in money falling due after a private sale of the land, or after a judicial sale with the deed acknowledged, and all grain of the vendor or debtor then growing on the land, go to the vendee, and no assignment of them is good against the sheriff's vendee," citing numerous authorities. Stambaugh v. Yeates has been referred to with some degree of approbation in two of our later decisions, Bear v. Bitzer, 4 Harris, 175, and Hershey v. Metzgar, 9 Norris, 217. But in both of those cases it was only the abstract doctrine of the former case that was quoted and applied, to wit, that growing grain was personal property, and liable to be seized and sold as such by judicial process. Abstractly this is true, and in the concrete it is true also, if the grain in question is the property of the person in possession, as was the fact in both Bear v. Bitzer and Hershey v. Metzgar. The facts of those cases required the application of the doctrine in the terms above stated, because it was the grain of the owner who was himself in possession. But in Bear v. Bitzer the purchaser of the grain under the *fieri facias* took no title because there was a prior sheriff's sale of the land, under which the title to the grain passed with the land to the purchaser. Neither of these cases, however, affirmed that when the land was let to a tenant on shares, the interest of the landlord in the growing grain could be seized and sold upon execution before severance, so as to pass a good title thereto as against a purchaser at sheriff's sale of the land, also before severance. In other words, neither of the cases referred to, held that the judicial sale under the *fieri facias* against the landlord, would of itself constitute a severance. That is the question in this case, and for the reasons stated, we are of opinion that no severance was wrought by the sale under the *fieri facias* to Seevers, and hence he took no title to the landlord's share of the growing grain, as against Long, who subsequently purchased the land at sheriff's sale, and obtained his deed before the rent fell due.

Judgment reversed and *venire de novo* awarded.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA, ... 7, 10, 21
CALIFORNIA, ... 12, 23, 27
ILLINOIS, ... 33
INDIANA, ... 5, 9, 18, 30
IOWA, ... 26, 28
LOUISIANA, ... 13
MASSACHUSETTS, ... 3, 4, 15, 17, 22
MINNESOTA, ... 32
NEBRASKA, ... 25
NEW JERSEY, ... 6
NEW YORK, ... 24
NORTH CAROLINA, ... 20
OREGON, ... 19
PENNSYLVANIA, ... 29
SOUTH CAROLINA, ... 2, 11, 34
TEXAS, ... 1
FEDERAL CIRCUIT, ... 8, 16, 31
ENGLISH, ... 14

1. ACTION—JOINT OWNERS OF CROPS AND LAND.
A rented land to B, the contract being that A was to receive as rent a part of the crops raised on the land. B had crops growing upon the land, which were injured by the wrongful act of C. At the time of the injury to the crops, B had also rented the land for the next year. *Held*, that A and B were jointly interested in both the crops and the land, and were entitled to maintain a suit jointly against C to recover damage done to the crops and land. *Texas, etc. R. Co. v. Beauchamp*, Tex. Ct. App. April 30, 1884; 4 Tex. L. Rev. 187.

2. ACTION—MONEY PAID—COLLATERAL SECURITY—DUTY TO TENDER BACK.
One who advances money to the owner of land to aid him in redeeming such land from tax sales, and who takes an assignment of the tax deeds as collateral security is not bound to tender such deeds to the party as a prerequisite to the maintenance of *assumpsit* for money paid. *Copeland v. Young*, S. C. So. Car. June 18, 1884, Charles. N. & C. Oct. 3, 1884.

3. AGENCY—DETENTION OF PRINCIPAL'S MONEY—INTEREST—RATE.
An agent is not liable for detaining money from his principal in the rate which the principal was obliged to pay on loans necessary to be procured by reason of such detention. The legal rate is the measure of damages. *Parker v. Nickerson*, S. J. C. Mass. Sept. 1884; 7 Mass. L. Rep. No. 45.

4. AGENCY—SELLING TO PRINCIPAL—PROFITS.
If an agent buys goods on his account with his own money, not for the purpose of selling it to his principal, and no duty at the time of purchase rests upon him to make such purchases, and he afterwards sells it to the company at a good advance, but at regular market price, he is entitled to retain all the profits made by him in the transaction. *Parker v. Nickerson*, S. J. C. Mass. Sept 1884; 7 Mass. L. Rep. No. 45.

5. ALTERATION OF WRITTEN INSTRUMENTS—MORTGAGE FOR PURCHASE MONEY—RELEASE OF DOWER.

Where a mortgage is given for the purchase money of real estate, it is not necessary that the wife of the mortgagor should sign it. And if she does so, and the mortgagor consents to an alteration of the note thereby secured, the fact that she did not consent to such alteration will have no effect on the validity of the note or mortgage. *Bowman v. Mitchell*, S. C. Ind. Sept. 20, 1884.

6. ASSUMPSIT—MONEY HAD AND RECEIVED—PRIVITY—ADMINISTRATOR.

Where one receives from a bank money standing in the name of a decedent, agreeing to pay over the amount to the administrator when appointed, the administrator, after his appointment, may maintain an action for money had and received against such person. *Nolan v. Manton*, S. C. N. J., June Term, 1884; 18 Rep. 401.

7. ADVERSE POSSESSION—ENTRY UNDER CONTRACT OF PURCHASE.

When a purchaser or donee of lands is put in possession under the contract or parol gift, though no deed is executed to him, his possession becomes adverse from the time he makes full payment of the purchase money or takes possession. *Kelly v. Hancock*, S. C. Ala.; *Vandeveer v. Stickney*, S. C. Ala.

8. CONSTITUTIONAL LAW — DISCRIMINATION — EFFECT OF UNCONSTITUTIONAL LAW—AMENDMENT TO VALID ACT.

The validity of a constitutional act is not affected by an amendment which is unconstitutional, because it discriminates between citizens of different States, and which does not in terms repeal the original act. The amendment is void, and does not by implication repeal the original act. *Ex parte Davis*, U. S. C. C. D. Ky., Aug. 8, 1884; 21 Fed. Rep. 196.

9. CONSTITUTIONAL LAW—PROHIBITION OF EXCESSIVE INDEBTEDNESS.

A constitutional provision forbidding the creation of municipal indebtedness beyond a fixed sum, relates only to current indebtedness, and does not forbid the making of contracts of long duration for furnishing gas, water, etc., although the gross expense for the whole term exceeded the *maximum* amount. *City of Valparaiso v. Gardner*, S. C. Ind. September 26, 1884; 4 Ind. L. Mag. 26.

10. CORPORATION — MALICIOUS PROSECUTION MAY BE MAINTAINED AGAINST.

An action on the case for a malicious prosecution may be maintained against a corporation. Owsley v. M. & P. W. R. R. Co., is overruled. *Jordan v. G. S. R. R. Co.*, S. C. Ala. Reporter's Head Notes.

11. COUNTER-CLAIM—INJURY TO TENANTS IN COMMON.

In a suit against a man who is a tenant in common of lands, not the subject of the suit, the latter cannot set up as a counter-claim the damage done to the land by the plaintiff, such injury being to all the tenants, and indivisible. *Copeland v. Young*, S. C. So. Car. June 10, 1884; Charles. N. & C. Oct. 3, 1884.

12. CRIMINAL EVIDENCE—STATEMENT OF PRISONER—VOLUNTARY ADMISSION.

Statements made by a prisoner, not in themselves involving his guilt, are admissible in evidence without preliminary proof that they were voluntarily made, although such statements, when taken in connection with other facts, tend to prove his guilt. *People v. Le Roy*, S. C. Cal. Sept. 18, 1884, 3 W. C. Rep. 785.

13. CRIMINAL EVIDENCE—DECLARATIONS OF ONE DEFENDANT—RES GESTAE.

Testimony offered to show that a co-defendant, in a case of larceny, and a fugitive from justice, called upon and induced the prisoner to assist him to go after the stolen property is original evidence and not hearsay; such facts form part of the *res gestae*. *State v. Jacques*, S. C. La. 18 Rep. 391.

14. DAMAGES—MEASURE OF—COLLISION—DELAY OF CARGO—LOSS OF SALES.

Where by reason of a collision between two steamships, occasioned by the negligence of one, goods carried by the other are delayed in transit, damages for loss of market are not recoverable as being too remote by reason of the uncertainty of the duration of a sea voyage. *The Notting Hill*, Eng. Ct. of App. Apr. 30, 1884; 51 L. T. N. S. 66.

15. EQUITY—CREDITOR'S BILL—LIEN.

A creditor's bill creates no lien upon a fund paid into court, as belonging to the debtor, and if the debtor goes into insolvency pending the suit, the fund follows him. *Powers v. Raymond*, S. J. C. Mass. Sept. 1884; 7 Mass. L. Rep. No. 44.

16. EQUITY—PLEADING — MULTIFARIOUSNESS—ACTION BY RECEIVER OF NATIONAL BANK.

Where a bill, brought by the receiver of a national bank against all of the directors holding office during the existence of the bank, the legal representatives of deceased directors, and the cashiers of the bank, joins claims for losses suffered by the bank by reason of the director's negligence and inattention, and claims for losses suffered by the stockholders by reason of having been induced to subscribe for new shares by misrepresentations of the directors, it is multifarious. *Price v. Colman*, U. S. C. C. D. Mass. Sept. 3, 1884; 21 Fed. Rep. 357.

17. EQUITY—TRIAL BY JURY—CREDITOR'S BILL.

Where a defendant in a creditor's bill in equity denies the existence of any debt, and none has been reduced to judgment, a trial by jury is demandable. *Powers v. Raymond*, S. J. C. Mass. Sept. 1884; 7 Mass. L. Rep. No. 44.

18. ESTOPPEL—ACCEPTANCE OF DEED FROM CORPORATION—DENIAL OF CORPORATE CHARACTER.

One who accepts a conveyance from, or derives title through a company assuming to be and acting as a corporation, and relies on such conveyance or title so derived, can not be permitted to deny the legal existence of the company as a corporation, for the purpose of defeating the claim of some third person. *Hasselman v. U. S. Mortgage Co.* S. C. Ind. Sept. 25, 1884.

19. ESTOPPEL—PURCHASE OF REAL ESTATE—TRUST—CORPORATION.

One who purchases real estate in his own name, although representing himself to the vendor as acting in behalf of a corporation, is not estopped from disputing the right of the corporation to hold him as a trustee of the property bought, if such purchase were made without the authorization of the corporation. *Kelly v. Ruble*, S. C. Oreg. 3 W. C. Rep. 757.

XUM

20. EVIDENCE—ADMISSIONS—PLEADINGS—VERIFICATION.

The admissions of a party contained in the pleadings filed in a cause are competent evidence against him whether the pleadings are verified or not, or signed by the party or his attorneys. *Guy v. Manuel*, S. C. N. C. 18 Rep. 441.

21. EVIDENCE—ANIMUS AGAINST ACCUSED—RELATIONS BETWEEN PARTIES.

The defendant being on trial under an indictment for the arson of a mill belonging to one Stewart, a witness for the defense was asked, on cross-examination, "the state of feeling between defendant's family and Stewart's family;" and answered "that it was good, but some of the defendant's family did not like Mrs. Stewart much." *Held*, that the evidence was irrelevant, and ought not to have been admitted against objection. *Bell v. The State*, S. C. Ala.

22. EVIDENCE—GENERAL CUSTOM.

At the trial of an action of replevin the point in issue was whether the sale of the goods in question had been absolute or conditional. The defendant put the question: "Is there any custom which is general and universal among your trade in selling a bill of goods, cash, five off, thirty, and goods delivered, as to whether that is regarded as an absolute sale?" *Held*, that the question was admissible. *Sears v. LeBetter*, S. J. C. Mass. June 28, 1884; 18 Rep. 394.

23. EVIDENCE—LOST PUBLIC DOCUMENT—COPY.

A lost original public document can be proved by a copy or by parol evidence, but not by a writing purporting to be a copy of a certified copy of the lost instrument. *Dyer v. Hudson*, S. C. Cal. June 1884; 18 Rep. 424.

24. EVIDENCE—SUFFICIENCY—ACCOMPLICES.

Where independent evidence tended to show that an insured owner had substituted cheap for valuable horses in his stable and had attempted to bribe a by-stander to keep still shortly before the fire, there was sufficient independent evidence to allow of conviction for arson on the testimony of accomplices. *People v. Hooghkerk*, N. Y. Ct. App. 13 Ins. L. J. 749.

25. FORCIBLE ENTRY AND DETAINER—VENDOR AND VENDEE—DEFAULT IN PAYMENT—FORFEITURE OF CONTRACT.

An action of forcible entry and detainer cannot be maintained by a vendor of real estate against a purchaser who is in possession and has made default in the payment of a part of the purchase price, even though the contract provides that time is the essence of the contract, and a failure to pay promptly as the payments become due shall work a forfeiture of the contract and the vendor be entitled to the possession of the land. *C. B. & Q. R. Co. v. Skupa*, S. C. Neb. Sept. 10, 1884; 20 N. W. Rep. 393.

26. INSURANCE—FIRE—PROHIBITION OF ALIENATION.

Where one of the provisions of an insurance policy given to a partnership is that "if the title of the property is transferred, incumbered, or changed, * * * the policy shall be void," a dissolution of the partnership, and a sale by one partner to the other of his interest, is a change of title to the property, and will render the policy void. *Hathway v. State Ins. Co.* S. C. Iowa, 13 Ins. L. J. 774.

27. LIBEL—ACTION FOR—VARIANCE—PARTIES PLAINTIFF.

In an action for libel proof that the libelous words were published of the plaintiff and a third person, is not a fatal variance. In such actions when the injury is several, each person injured must sue alone. *Robinett v. McDonald*, S. C. Cal. Sept. 18, 1884; 3 W. C. Rep. 787.

28. LIMITATIONS—RECOVERY OF PREMIUM OF VOID POLICY—LIMITATION IN POLICY.

A suit to recover back the premium upon a void policy is not affected by a provision that no action shall be brought upon the policy unless within a year after a loss occurs. Suit may be brought though more than a year has elapsed since the loss. *Waller v. N. W. Ass. Co.* S. C. Iowa, 13 Ins. L. J. 789.

29. LITERARY PROPERTY—LECTURES—INJUNCTION.

A court will not make a decree enjoining generally the publication by the defendant of "any book containing the substance of lectures delivered by the complainant." *Miller's Appeal*, S. C. Pa. April 21, 1884; 18 Rep. 445.

30. MARRIED WOMEN—MECHANIC'S LIEN.

Where a husband, with the knowledge and consent of his wife erects a house on her land a mechanic's lien thereon will result. *Cannon v. Helfrick*, S. C. Ind. Sept. 18, 1884.

31. NATIONAL BANKS—LOAN ON STOCK—LIEN—BY-LAWS.

A by-law of a bank creating a lien on stock of a stockholder for money loaned him is void, as in contravention of sec 5201 of Rev. Stat. of U. S. forbidding loans on its own stock. *Fechmier v. Nat. Exch. Bank U. S. C. C.* 18 Rep. 410.

32. PARENT AND CHILD—MAINTENANCE OF CHILD—RE-MARRIAGE OF MOTHER—STEP-FATHER.

A widow, upon her re-marriage, is not liable for the support of her minor child by a former husband, but is entitled to have his income applied thereto. And a step-father is not bound to maintain the children of his wife by a former marriage, unless he voluntarily assume the relation of parent, and receives them into his family under circumstances such as to raise a presumption that he has undertaken to support them gratuitously. *In re Besoudy* S. C. Minn. Aug. 12, 1884; 20 N. W. Rep. 366; 6 Ohio L. J. 187.

33. PARTNERSHIP—DEBTS—DISSOLUTION BY DECEASE OF PARTNER—NEGLECT TO SUE—INSOLVENCY.

Every partnership debt, in equity, being joint and several, the holder of the same may, in case of the death of a partner, resort, in the first instance, to the surviving partners, or to the assets of the deceased partner, as he may elect; and a failure to proceed against the surviving partners until their insolvency is no bar to its collection from the estate of the deceased partner. *Doggett v. Dill*, S. C. Ill. 30 Alb. L. J. 274.

34. PARTNERSHIP—PURCHASE OF PROPERTY BY PARTNER WITH FIRM FUNDS.

A partner who takes money from the firm till without notice, and purchases stock therewith, charging himself on the firm books with the sum taken, confers no title to such stock upon the partnership, and it is liable to be taken for his individual debts. *Maybin v. Moorman*, S. C. So. Car. July 1, 1884; Charles. N. & C. Oct. 3, 1884.

LEGAL MISCELLANY.

HOW TO ARGUE A BAD CASE.

By Geo. M. Davis, Esq., of Louisville.

In arguing a bad case before the judge, the first thing for the sagacious practitioner to do, is to get as far away from the merits of the case as possible. With this idea you must make your real case of secondary importance, or further off even than that, if possible. Plant yourself at once, therefore, upon some broad principle, and endeavor to allure the other side into grappling with you upon it. Rise above the mere case of your Mr. Jones, and make the country at large stand as your imperiled client. In other words, the first thing to do, if possible, is, with a look of profundity, and voice of rotundity, to raise a "constitutional point."

Now there is nothing so pleasing to the ordinary *nisi prius* judge as to have raised, in his court, deep problems of constitutional law. When you rise, with a copy of Cooley, Story and other constitutional authorities before you, and, for purposes of greater impression, the fifty pound volume of the United States Revised Statutes containing the Federal Constitution (for the bigger the book the better, in constitutional arguments), you will perceive the judge at once undergo a marked change. If he has, from democratic tendencies, or from the heat of summer, taken off his coat, or drawn his boots, you will see him carefully put them on, and, bracing himself back as an "upright judge," sit with a thoughtful air, conscious that there now hangs upon him the destiny of the country and of the future unborn. You may, perhaps, perceive during the argument none of the usual signs of weariness, but rather that expression of fortitude and death which one might imagine Chief Justice Marshall's countenance to have exhibited during the argument of the Dartmouth College case by Daniel Webster.

There is nothing better in a bad case than to announce, with emotional intensity, that the effort of the opposing counsel would, if permitted to be successful, result in a decomposition of "vested rights;" or that they would ruthlessly impair the "solemn obligation of contracts;" or that they are permeated with "*ex post facto*" malignity.

Magistrates' courts, I have observed, are peculiarly susceptible to the seductive influence of constitutional law.

Nor, in these fundamental ramifications, should you confine yourself alone to the constitution of your particular State. You should "broaden yourself out" and take in the Constitution of the Union; including the recent amendments, which, under a "broad-minded" construction, you may contend, with a fair hope of being allowed to proceed, to mean almost anything that your necessities require. Nay, your genius, if capable of still greater daring, may soar back to "*Magna Charta*" itself, and disport awhile amid reminiscences of "Runnymede," "King John," and the "Powerful Barons," who so often serve for padding in the powerful efforts of our locally great.

When, however, you feel that you can no longer sustain your flight in the rarefied atmosphere of the lofty altitudes of constitutional law, be sure, in your downward descent, that you alight upon the "Statutes."

Now, in the great body of statutory law, it will be marvelous indeed if you cannot find something that will give you hope and comfort. Remember, in the first place, that all the statutes of England prior to the "fourth year of James I," are good as new here n Kentucky. Remember, too, that all the statutes of Virginia "prior to 1792" are also legal tender. Remember further, that all the statutes that fill the tremendous volumes of the "United States at Large," are full of potency and that the great body of our own laws, as amended and improved by the constantly augmenting wisdom of succeeding legislative intelligences, has created a mass of profound statutory law, some of which will strengthen almost any bad case that may be imagined. There are many sections of our code that can, by a little ingenious construction, be converted into bulwarks behind which a bad case may rest in apparent safety. I remember, a few days ago, when an injunction was sued out to prevent a Kentucky corporation (the Knights of Honor) from emigrating from the State of Kentucky to to Missouri, an ingenious friend suggested to me, as counsel for the proposed emigrant, a statutory argument, my failure to use which possibly led to the perpetuation of the injunction. He called attention to sec. 688 of the code, which "abolishes the writ of '*ne exeat*,'" and he said: "How can this corporation be prevented from going out of the State, when the writ of '*ne exeat*' has been abolished by solemn statute?"

If, however, you cannot, by ingenious and subtle transfiguration of the statutes, manage to anchor your case in the rapids, the next best thing is to fall back upon your reserve learning, and to make disclosure of what my Lord Coke calls "The Amiable and Admirable Secrets of the Common Law."

The current scientific theory of this day is that of "evolution," and one of the leading tenets of evolution is, that mankind, in its progress from barbarism to civilization, passes through many degrees of morals; so that, at one time in its career a thing will be considered right, which at a later time, will be declared wrong; very much as the clothes of a child are ridiculed as unfit when he comes to be a man.

Whatever case you may have, therefore, and however bad it may seem now, it is pretty certain that it would have fitted the ideas of right in some one stage of the progress of the evolution of England from its barbaric state to its present condition. The fact is, that a bad case is somewhat like Lord Palmerston's famous definition of "dirt." He said that dirt was simply "matter out of place." So a bad case is simply a case out of time. In old times, we know that murder was rather approved as a fine art in England; and we know that batteries and trespasses were by no means as reprehensible as now. Embezzlements are still cherished by the common law as no crimes. You have, therefore, only to search back through the various strata of the English common law to that one to which your case properly belongs; and you will generally have little difficulty in finding precedents somewhere in the line that fit and justify it entirely. For example, the case, bad at this time, was probably a good case in the time of Coke; and, therefore, Coke is your authority. If your case be very bad you may have to go as far back as Bracton, or even to the Year Books. But then the further back you go the more learned it sounds.

And it is to be said in favor of this common law mode of presenting a bad case, that nothing is more pleasing to the judge than to hear arguments, and to rest his opinions upon old common law points. An opinion of a modern judge, so full of the old common law authorities that you can almost blow the dust off it, is looked upon by its author with peculiar pride; for he knows that it is sure to be complimented as "able and exhaustive" by succeeding lawyers who may have occasion to cite it as authority in their favor.

Let us assume, however, that you have searched the

heights of the Constitution and the depths of the Statutes and the varying strata of the common law, and found no comfort there. Under such circumstances, it may pay you, like many persons who have committed dubious acts in England, to take a little trip abroad. In other words, you should stray over into the domain of the "civil law." You may, thereupon, descant learnedly upon the "Code of Justinian" or the "Code Napoleon," and exhibit traces of a mind too broad for this hemisphere. You will find that a little dab of civil law, especially in Latin, will sometimes cause the judge to come down without further debate.

A large amount of this peculiar Latin may be found ready in Judge Story's Book on Bailments.

If, however, all of these successive resources that I have named, prove fruitless, you will be driven to another resort, viz.: the Kentucky Reports. And here let me warn you not to be downcast or disheartened at this stage; nor should you yield to the gloomy apprehension, that because you have found the law against you everywhere else you will also find it against you there. By beating the "Bushes" you may expect to scare up much unexpected law.

Of course, if a case is found in your favor there, it generally ends your troubles; for it will be followed by all the courts in the State, except sometimes by the one that rendered it.

There is also a very valuable magazine of unknown learning in those manuscript opinions marked "not to be reported." I have known some desperate cases to be won by the citation, from memory, by our older lawyers, of manuscript opinions, which, however, they always assure us younger members, were "burned up in the appellate clerk's office fire in 1865."

An ingenious member of the bar, it is said, has with great advantage invented the idea of saying to the judge below, that he has, besides reading the opinion, had a more or less confidential talk with the judge who wrote it, in which the judge told him that the opinion was meant to go much further than on its face it seems to go; and our friend sometimes accompanies this with an intimation, that if the judge below, does not regard the additional light thrown upon the opinion by this confidential communication, the chances are he will have occasion to meet that most dreadful of all things to a *nisi prius* judge, a reversal of his opinion on an intimated appeal.

If you find, after a careful exploration of Barbour's Digest, that the Kentucky law also is silent when you invoke it, the next thing left you is to attack that myriad-minded monster, the "United States Digest." Sit yourself down therefore to this work of digestion, in that hopeful spirit in which the sick and hungry Sancho Panza contemplated an "Olla podrida."

"Quote Sancho, that great dish which I see smoking yonder I take to be an olla-podrida; and amidst the diversity of things therein contained, I may surely light upon something both wholesome and toothsome."

It is the boast of our American people that, owing to our very great diversity of soil and climate, we are able to show well-nigh every product of nature, from the tropical fruits of Florida, Texas and the Pacific Coast, to the hardy pines of frigid Maine. But while America may be proud of her diversity of products in other directions, her greatest praise for variety of production is certainly in the line of the law. If a vote were put on any conceivable point, to the reports of the thirty-eight States, rarely indeed would it be "unanimously carried." It has been poetically said that when Nero died "one" hand strewed flowers upon his tomb; and no matter how bad your case may be, you may rest assured that you can lay upon its tomb the tribute of some precedent in its favor, from the United States Digest.

Let us suppose, however, that you have gone through all these processes of enlightenment, and have bombarded the court with the various legal artilleries I have named. Let us suppose your case so bad that you can develop nothing in the Constitution or the Statutes, or the decisions to support you. Still do not succumb. Your case is a hard one. But all is not yet lost. There is one last resort for the despairing attorney. There is one faint light which his dying eyes may see. It may not amount to much. It may prove illusive. But it is the duty of the lawyer to try all legal means. As a last resort, therefore, my friends, and only in that dreadful extremity, fall back upon what is known as the "argument upon principle" and the "merits of the case."

In that emergency, you may proceed to give, possibly from your own personal knowledge, a vivid biographical sketch of the moral perfections of your client; and perhaps likewise a converse picture of the mental and moral obliquities of his opponent. Pay that compliment to the credibility of your witnesses which they have always deserved, but have perhaps never before received. Denounce the "technicalities" of the opposing law. Appeal to that higher plane of the profession, in which the judge, overlooking mere technical precedents, rises into abstract ethics, and considers the case upon "high points and general principles." Indulge the sensibilities of the race. Bring the calm light of the emotions into play, to assist the logic of the court. Paint the beneficent effects of the decision in your favor. Depict the fearful consequences of a decision against you. And wind up with an inspiring burst of professional fervor, or by a pathetic appeal, in a minor key.

If, however, in spite of all these laudable legal efforts, the judge below is obdurate, and the decision is against your unhappy client, still, my brother, do not yield wholly to despair. As in the death of a good man comes his brightest hope, so in the loss of a bad case comes its best opportunity. Remember there is organized, in the jurisprudence of every State, a series of superior tribunals, "created for the express purpose," as Judge Emmons once said, "of reversing the lower courts." Remember, as you lie rolling over in the dust of the lower arena, that there still stands a higher tribunal, whose doors are only open to the defeated and the beaten, and to cases adjudged "bad," and to which the successful can never appeal.

At the threshold of the Appellate Courts the history of a "bad case" naturally ends; for, there under the requirement of even-handed justice, all cases must stand alike.

NOTES.

—Austin Abbott, Esq., the well-known legal writer, whose able management of the ever esteemed *Daily Register* has much increased its usefulness, says: "Perhaps the most ingenious and skillful attempt to state an entire doctrine of the law with all its necessary qualifications and exceptions is that presented by the article of Elisha Greenhood, Esq., in a series on 'General Restrictions on Business Freedom,' contained in the CENTRAL LAW JOURNAL, (in this current volume, numbers 4 and 5), of which he is the editor."